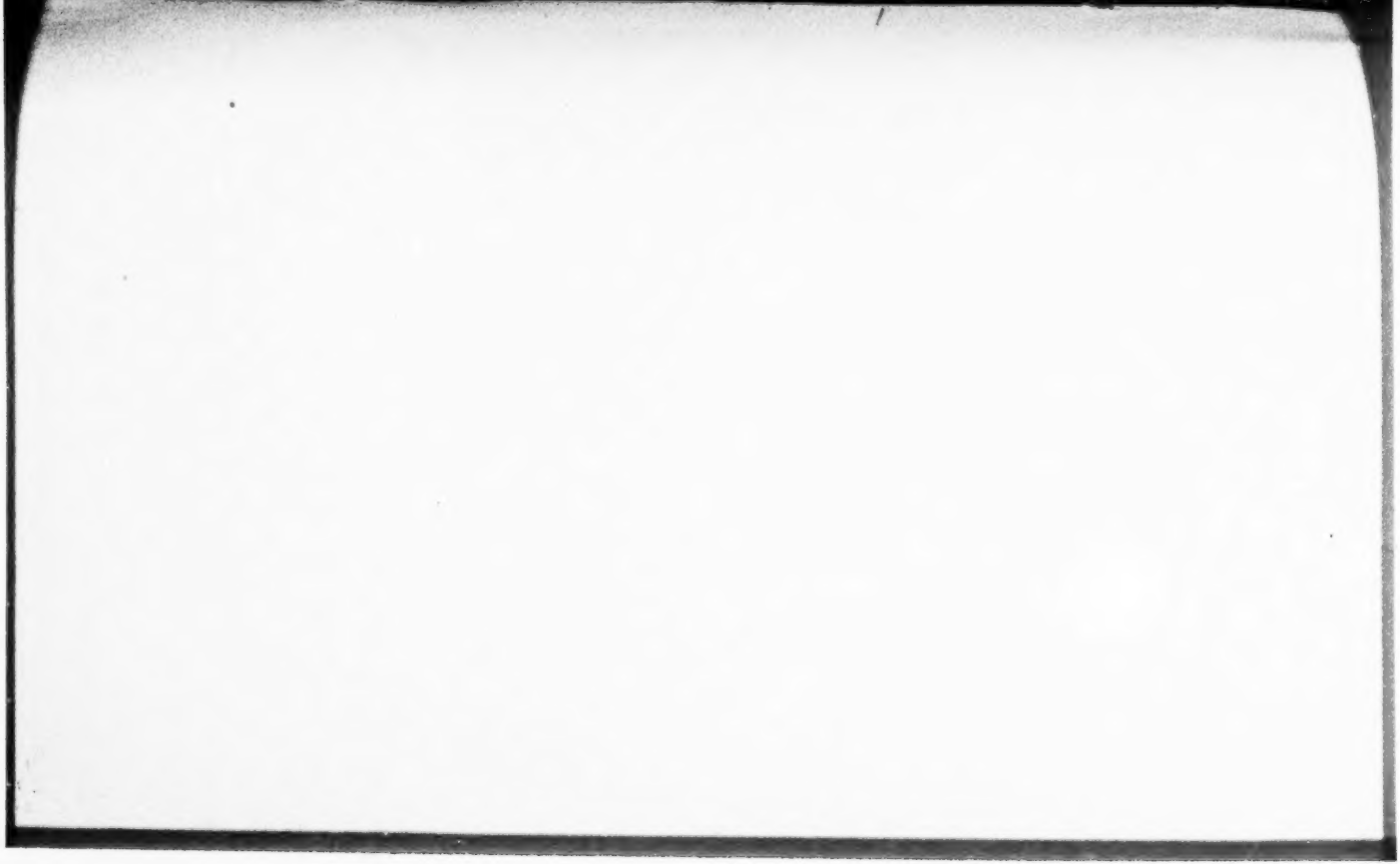

SUPREME COURT OF THE UNITED STATES

October Term, 1908

CHOCTAW, OKLAHOMA & GULF R. R. CO.,
Plaintiff in Error,

vs. } No. 436.

LAURA LOUISE MEDARIS BRYAN,
Defendant in Error.

Brief for Plaintiff in Error.

J. W. McCLOUD,
GEO. S. PEYTON,
E. B. WHEELER,
C. M. BRYAN,
Attorneys.

IN THE

SUPREME COURT OF THE UNITED STATES

APRIL TERM, 1903.

CHOCTAW, OKLAHOMA & GULF R. R. CO.,
Plaintiff in Error.

versus } No. 288.

LAURA LOUISE McDADE ET AL.,
Defendants in Error.

STATEMENT OF CASE.

This action was commenced in the Circuit Court of Shelby County, Tennessee, by the issuance of summons, and upon proper service obtained. Defendants in error filed their declaration therein. The plaintiff in error being a non-resident corporation, filed its petition for removal upon the grounds of diverse citizenship, which petition was granted, and the case removed to the United States Circuit Court for the Western Division of the Western District of Tennessee. (Record, pp. 2 to 8.)

The declaration, in so far as it need be set forth, avers that on or about the 19th day of August, 1900, John I. McDade, aged 27 years, was in the employ of the defendant, a steam commercial railroad company, as a brakeman on one of its freight trains; that about 1:30 o'clock a. m. on said day, while he was on top of one of the cars of defendant company, in the regular discharge of his duty as brakeman, and without any negligence on his part, the said Jno. I. McDade, at the time, when said freight train, drawn by one of the defendant's engines, was moving at a high rate of speed on, and over, the tracks of said railroad company, was violently struck and knocked off the said freight car by an iron spout suspended from one of defendant's water tanks; that this accident occurred near the town of Goodwin, in the State of Arkansas, and that John

McDade was so injured from such blow and fall that he died a few hours after the injuries occurred. Plaintiffs aver, that the death of the said John I. McDade was occasioned solely through the gross negligence of the defendant company in the following particulars, to wit: First, the failure to provide a safe and suitable place in which the deceased could discharge his duty. Second, in permitting the watersway spout to be and remain suspended so low over the track of the defendant as to endanger the life of its employe when in the discharge of his duties, which required him frequently to sit and stand upon the top of trains running under said spout. Third, that the defendant company was guilty of gross negligence in failing to provide the suitable chains, pulleys, etc., by which said spout could be hoisted back into an upright or perpendicular position, and so remain when not in use; and, in short, that the said defendant company failed to use ordinary care in the construction and maintenance of said spout, as well as in the inspection of the same. Fourth, in brief, plaintiff avers that the death of the said John I. McDade was proximately caused by the negligence of the defendant company, to which there was no contribution upon the part of the deceased. Fifth, plaintiffs aver that under the statute laws of the State of Arkansas they are entitled to recover $20,000 damages for the death of the said John I. McDade, so wrongfully killed by the defendant company, since they aver that they are the heirs-at-law and the designated beneficiaries under the statutes of Arkansas, which give them the right of recovery in this cause. (Record, pp. 3 and 4.)

After removal the railroad company entered two pleas. First, what is designated under the procedure of Tennessee as the general issue, broadly denying any actionable negligence upon the part of the defendant below. Second, for further plea in its behalf, the defendant averred that there was such contributory negligence upon the part of the deceased as would bar his beneficiaries from any recovery, even though the defendant, upon its part, had been guilty of negligence. (Record, p. 9.)

Upon the issues so made up the case was tried in the United States Circuit Court for the Western Division of the Western District of Tennessee, before Hon. E. S. Hammond, Circuit Judge, and a jury, where a verdict was rendered in favor of the plaintiffs below for $5,000 damages. (Record, p. 13.)

Motions for a new trial and in arrest of judgment were duly made by plaintiff in error, and were overruled by the presiding judge, whereupon exception was taken to the overruling of these motions, and the case carried to the United States Circuit Court of Appeals for the Sixth Circuit, sitting at Cincinnati.

This court affirmed the judgment of the Circuit Court of Appeals on January 7, 1902.

Supersedeas bond was duly filed, and petition for writ of error prayed from the Supreme Court of the United States.

Said petition was duly granted, and the case brought by writ of error to this court.

The facts in the case, as shown by the evidence, are as follows: John I. McDade, for whose death this suit was brought, had been in the railroad business for some twelve or fifteen years prior to his death. He had occupied positions both as brakeman and conductor, and had served on several different railroads in these capacities; he was a thorough railroad brakeman and conductor, when, about the 24th of June, 1900, he entered the employ of the Choctaw, Oklahoma & Gulf Railroad Company as head brakeman. (Record, pp. 16 and 17.)

At the time of his death he was 27 years old, and left a wife, Mrs. Bettie C. McDade, and three girls, aged 1, 4 and 5 years, who, together with their mother, are the plaintiffs in this action. (Record, pp. 16 and 17.)

From the 24th of June, 1900, until August 19, the day upon which McDade was killed, he regularly ran upon the freight trains of the Choctaw, Oklahoma & Gulf Railroad Company, daily performing the duties of head brakeman. He had been performing these duties upon the Memphis division of the defendant railroad, which extends from Memphis, its eastern terminus, westward to Little Rock, for about six weeks prior to his death; and prior to the time that the said McDade ran upon the Memphis division he had run as brakeman on the western division of the railroad, which extended west from Little Rock. (Record, pp, 15, 38, 82, 114 to 117.)

On the night of August 18, 1900, the said John I. McDade left Memphis attached as brakeman to the train crew having charge of a freight train owned and operated by defendant company, which train was a local freight train, No. 9, and ran from Memphis, the eastern terminus of the said road, west to Little Rock, Arkansas, one of its

intermediate stations, a distance of about 130 miles. (Record, pp. 38, 39, 41, 42, 82, 83, 97 and 98.)

This train consisted of an engine and twenty-seven freight cars, and left Hopefield, the transfer station at Memphis, at 9:30 p. m., arriving at Little Rock the next day at 11:25 a. m. McDade performed his duties as head brakeman upon this train as it proceeded westward, and was last seen alive as the train left Forrest City, Ark., about 12:10 a. m. At that time the conductor of the train, C. A. Hollowell by name, held a conversation with him. (Record, p. 38.)

The train then proceeded westward, and as the train approached Goodwin Station, several miles west of Forrest City, and about 1:20 a. m., both the conductor and rear brakeman, as well as the engineer attached to train No. 9, saw a lamp signal given from the position that McDade occupied upon the train. (Record, pp. 40, 41, 82, 83, 84 and 149.)

When McDade gave this signal he was either standing or sitting upon one of the freight cars, about ten cars from the engine. (Record, pp. 40 and 83.)

This signal was given first by the conductor, who was in the caboose in the rear of the train, to the rear brakeman, W. D. Kennedy, who was several cars from the rear, and by him communicated to McDade, who was about ten cars from the engine, and by McDade communicated to the engineer, who was sitting in the engine cab. This signal was a go-ahead signal, and was given by merely raising lighted lanterns from the sides of the cars, and its meaning was an order from the conductor to the engineer to proceed through Goodwin Station without stoppage, and was communicated from the conductor to the engineer almost simultaneously. The signal was given by McDade when the train was a little more than one-half a mile east of Goodwin Station, and consisted in McDade's simply waving the lighted lantern from the side of the freight car upon which he is supposed to have been sitting. (Record, pp. 40, 41, 82 and 83.)

There is nothing in the record to show, except mere speculation, what was the position that McDade occupied upon the top of the car when he gave the last signal, as the train approached Goodwin; that is, there is nothing to show, except opinion, as to whether McDade was standing up or sitting down when this signal was given. (Record, pp. 41, 54, 55, 56, 83 and 86.)

At Goodwin Station was situated the water tank which the plaintiffs aver caused the death of the deceased. (Record, p. 23.)

Nothing more was seen of McDade, and his absence did not attract attention until the train reached Brinkley Station, nine miles west of Goodwin; there the train stopped, and the absence of McDade was noted. (Record, pp. 41, 42, 43 and 92.)

There search was instituted for McDade. The searching party consisted of the engineer, the conductor and the rear brakeman; they testified that they found his lantern on a furniture freight car, about ten cars from the engine; that it was placed in the grab iron on the side of the car, and end toward the engine, which grab iron is a part of the ladder of the car, the lantern being found on the right hand and north side of the train going west, and inside of the grab iron. The searchers, who had lighted torches, carefully examined the top and sides of this car, as well as the spaces between this car and the others to which it was joined, but found no evidences which would indicate the previous presence there of McDade; in short, there was no disturbance upon the car either of the dust or cinders that had accumulated thereon; neither were there any blood stains or any other marks of violence. (Record, pp. 41, 47, 92, 155, 156 and 157.)

The grab iron within which the lantern was found was about twelve inches from the edge of the car, and it was customary for brakemen, when sitting down upon the side of the cars, to have their lanterns by their sides. (Record, pp. 50 and 92.)

This lantern was burning when found. (Record, p. 92.)

After thorough search was made for McDade and a failure upon the part of the trainmen to find him, the trains following the train in question were telegraphed instructions to keep a lookout for McDade along the roadway with their headlights. When McDade was missed at Brinkley the trainmen knew that there was a passenger train following them closely, and consequently could not go back to look for McDade. This passenger train, No. 2, was communicated with, and, by virtue of its electric headlight, the body of McDade was discovered 675 feet west of the Goodwin tank, lying between the main track, upon which No. 9 ran, and a spur which jutted off at Goodwin Station. (Record, pp. 58, 59, 145, 146 and 147.)

He was found at 3:34 a. m., lying on his right side, with

his head doubled underneath and his body full of blood. He was facing the west, his back toward the east. There is a spur track which juts off from the main track at Goodwin tank and runs around the north side of the main track to a point some distance west of the point where McDade was found, and he was lying between this spur track and the main track. All trains, including the one that found McDade and the one to which he was attached, ran upon the main track during the night of the accident, and none of them ran upon this spur. The distance between the main track and the spur at the point where the body was found was about eight or nine feet, and McDade was found between the two tracks with his feet over near the ties of the main track, within two feet of the rail, while his head was about three feet from the crossties of the side track. (Record, pp. 146 and 147.)

The portion of the track at or near the point where he was found was level, hard and dry, as there had been no rain for a long time. His feet were about six inches from the crossties of the main track, and his head was doubled underneath his body. After he was found he breathed only once or twice, and died whilst being placed in the car. (Record, p. 146.)

The marks of violence found upon him were as follows: There was a wound upon the side of his head, whether the left or right side the record does not disclose positively, as the witnesses differ upon this fact. His ear was split and lip cut open, and some of his teeth were out, and he had a little scalp wound on his head, and one of his fingers broken. He likewise had a blow on the side of his head, and a blow on the front of his head, and a break on the hand. (Record, pp. 16, 17, 18 and 19.)

Prior to the date of the accident, McDade had been working about six weeks on the Memphis division of the Choctaw, Oklahoma & Gulf Railroad Company, upon which division he was working when killed; and had traveled over the entire road between Memphis and Little Rock many times during that period. In the discharge of his duties he had passed Goodwin Station both in the day time and in the night time. Each time he had passed over the railroad between Memphis and Little Rock, which is estimated at about ten round trips, before the date of the accident, and during this time this tank at Goodwin, with its spout and all appurtenances, had been in exactly the same condition that it was in at the time of the accident. (Record, pp. 38, 40 and 82.)

The car upon which his lantern was found was No. 28,149, Illinois Central Railroad furniture car, and had been delivered to the defendant railroad in the usual interchange of business. (Record, pp. 57 and 58.)

This furniture car was in build like an ordinary freight car, but was larger in every way than the usual box car, and was built larger because of the great amount of space that furniture occupies. Such cars were frequently handled by the defendant railroad company for some time prior to the date of the employment by it of McDade, and were frequently handled by the said railroad during the time that McDade worked upon that portion of the road which passed by Goodwin Station. (Record, pp. 41, 57, 58, 111, 112 and 114.) Prior to the time McDade had been running as brakeman over the Memphis division, he had been running as such over what is designated as the Booneville division of the Choctaw, Oklahoma & Gulf Railroad Company, which division extends westward from Little Rock; and, in the usual performance of his duties, he was obliged to pass and repass daily under the spouts of several different water tanks, which spouts were hung at the same angle as that of the Goodwin tank, and which tanks, with all their appurtenances, were exactly similar in construction, measurements and maintenance as the Goodwin tank, so that it may be taken as an undisputed fact that McDade had full and ample opportunity to ascertain the position of the Goodwin tank, and the situation of its spout, with regard to its distance from him, while performing his duties and occupying the various customary positions of a brakeman; and, since it is admitted that he was an experienced railroad man, the inference is clear that he was familiar with the dangers incident to passing under said spout while riding on freight cars. (Record, pp. 38, 48, 51, 54, 91, 92, 123 and 149.)

It is likewise proven that it is the duty of one occupying McDade's position to keep a careful lookout for all structures situated near to and projecting toward the track. (Record, p. 51.)

It is also uncontradicted that McDade was frequently attached to trains of the defendant company in which were situated furniture cars of like measurements as car No. 28,149, and while working as brakeman on said trains had passed the Goodwin tank many times prior to the date of the accident, both in the daylight and in the night time. (Record, pp. 111, 114 to 116.)

The tank at Goodwin Station was situated immediately westward of the depot, on the right hand, or north side, of the main track. (Record, p. 21.)

The tank consisted of the platform, supported by heavy timbers, upon which was placed a large water tank; to that part of the platform fronting the railroad track there was attached two heavy upright pieces, parallel to the tank, and in front of it, with a cross-beam at the top. To this cross-beam, and upon the underside, there were placed two fixed pulleys; through these pulleys ran two chains; to one end of each was attached a heavy iron weight; the other ends of these chains were attached to a large galvanized iron sway pipe, or spout; this spout was circular in shape, about 12 or 14 inches in diameter at the lower end and about 6 or 8 inches at the upper end. The lower end of the spout, which was the larger end, was not fixed or attached to anything when the tank was not in service; the upper end of the spout was in the shape of what is technically called a "goose neck;" that is, from the upper end of the spout, which was the smaller end, there was attached a curve or projection of like material as the rest of the spout, which extended directly toward the track almost at right angles. Underneath the platform, and running from the bottom of the tank proper, and below the platform, there was an iron supply pipe, which projected beyond the platform. To the underside of the sway pipe there were two small chains, and these chains were used by the firemen on the engines to pull the sway pipe down to such a position that its lower end would fit over the supply pipe, and thus allow the water from the tank proper to run through the supply pipe into the sway spout, and from thence into the engine. When not in use the lower end of the sway spout hung just above the mouth of the supply pipe, its nearer side to the tank being about on a line with the mouth of said supply pipe. Concerning the measurements of this tank and appurtenances so constructed, there was some difference in the testimony introduced by the plaintiff from that introduced by the defendant. The plaintiff introduced evidence showing the following measurements:

Distance from the neck of the supply pipe to the ground, 12 feet. Length of sway spout, 9 feet. Distance from a point upon the ground made by a line dropped perpendicularly from the neck of the supply pipe to the center of the nearest rail, 4 feet and 3 inches. Distance from a point on

the ground which was the termination of a line dropped perpendicularly from the extreme end of the goose neck, or the point upon the top of the spout which projected nearest to the rail, or center of the nearest rail, 4½ inches. Length of perpendicular line, 19 feet, from top of spout to the ground. Length of crook, or "goose neck," attached to the spout, 10 or 12 inches. The small chains attached to the spout, together with the ring, were 23 inches long. The angle of the slant of the spout was 3 feet in line. (Record, pp. 77, 78, 79, 80, 81.)

The defendant's evidence showed the length of a line dropped perpendicularly from the top, or nozzle, of the sway spout to the top of the track, 19 feet and 6 inches. The distance from a point upon the ground which was the termination of a line dropped from the mouth of the supply pipe perpendicularly to the center of the nearest rail, 4 feet 6½ inches. Distance from a point upon the ground which was the termination of a perpendicular line from the top, or nozzle, of the sway spout to the nearest rail, 6½ inches. The angle, or slant, of the sway spout is estimated at from 20 to 30 degrees—the difference between this angle and the angle contended for by the plaintiffs being accounted for by the fact that 10 or 12 inches of the sway spout extends directly toward the track at right angles, instead of obliquely; and the witness, Walker, who measured the slant for the plaintiffs, did not take into consideration this fact, because he measured the slant as about 3 feet in 9, whereas the goose neck extends at right angles with the track 10 inches. The other measurements agreed. (Record, pp. 127, 131, 166, 167.)

It is admitted that the furniture car was between 13 and 14 feet to the eaves thereof. It was 9 feet wide and 42 feet long; that the track was 4 feet 8½ inches wide, and that each rail was 2½ inches wide. (Record, pp. 101, 183, 170.)

It is likewise agreed that McDade was 6 feet 1 inch tall. It is also uncontradicted that, as the train to which McDade was attached passed Goodwin tank, the sway spout was in proper condition. It is likewise admitted that the night was clear, and that the electric headlight on the engine threw a light upon the water tank, fully disclosing it to any one on the cars for nearly a mile before the train reached the tank. (Record, pp. 17, 151, 156, 149.)

On the main issue, which it was necessary for the plaintiffs below to sustain, viz.: That the tank, together with its spout and other appurtenances, was not constructed or

maintained in proper condition, they only introduced one witness, R. H. Briggs, who testified that he was connected with the Kansas City system; that as such he was familiar with the construction of tanks, and that the sway spouts when at rest should hang absolutely vertical. (Record, p. 64.)

Over the objection of the defendant, this witness testified that when in proper position this sway spout should clear a car and a person thereon as it passed by; and he explained what he meant by this standard of proper construction by stating that this is the regular standard that the road department of the Kansas City system conforms to. (Record, pp. 65 and 66.)

On cross-examination he testified that he did not know how tanks were usually constructed on well regulated railroads throughout the United States, but that his experience and testimony was limited to the system that employed him. (Record, p. 70.)

On direct examination R. H. Briggs likewise testified that all of the sway spouts upon tanks situated on the Kansas City system hung perfectly vertical. In this he was contradicted; first, by his own testimony, for he admitted on cross-examination that there was one tank right in the city of Memphis the sway spout of which did not hang vertically; which tank belonged to the Kansas City system; second, the defendant introduced an engineer, who, at the time of the trial, was then in the employ of the Kansas City system, and who testified that he had just returned from a trip over the entire road, which trip he had taken to learn the road, and that every one of the water spouts upon the Kansas City system were swung at an angle and were not vertical, and that, moreover, upon the Kansas City system the sway spouts were hung just as the sway spout was hung upon the Goodwin tank prior to and at the time of the accident to John I. McDade—this witness having been familiar with the said tank at said time, as only recently he had left the services of the Choctaw, Oklahoma & Gulf Railroad Company to take service with the Kansas City system. (Record, pp. 119 and 120.)

The defendant below introduced upon this point the testimony of many expert railroad men who were familiar with the construction of tanks generally throughout the United States on well-regulated roads. They testified, first, that, of necessity, all sway spouts hung at an angle, because otherwise it would be most inconvenient, if not im-

possible, for the employes upon the engine to pull the sway spout down so as to put it in service by the small chains attached thereto; second, that the tank, with all of its appurtenances, at Goodwin Station, including the sway spout and the angle at which it was hung, was just such a structure as was generally used throughout the United States on well-regulated roads; third, that the construction of the Goodwin tank prior to and at the time of the accident was such that the sway spout would clear any one riding upon the top of a freight car, who was in the discharge of the ordinary duties of a brakeman. (Record, pp. 54, 91, 120, 131, 145, 146, 166.)

Over the objection of the defendant, the plaintiffs were allowed to prove that in the opinion of certain expert medical witnesses from a description of the injuries of McDade they were probably caused by two blows, and that, in their opinion, merely falling off the car upon the ground would not have caused the injuries sustained by him. However, one of these witnesses could not testify with any degree of certainty upon this point. Both of these witnesses likewise testified that these two blows might have been caused by the deceased falling on the sharp edge of the car and then to the ground, and that the injury upon the head undoubtedly caused the deceased to become immediately and continuously unconscious. (Record, pp. 104, 105, 108, 109, 119.)

The court also declined to allow W. W. Sherwood, a witness for the defendant below, who was familiar with the injuries sustained by persons falling off of a car, to state whether or not McDade, under the circumstances of this case, could have been knocked off by the spout. (Record, p. 148.)

At the close of the plaintiff's case the defendant requested a peremptory instruction in its behalf, which was refused by the court. Likewise, after the conclusion of the judge's charge, the defendant requested special instructions, which were either refused or modified, as shown in the bill of exceptions and assignments of error. (Record, pp. 205 and 206.)

A verdict for $5,000 was rendered in favor of the plaintiffs. Motions for a new trial and in arrest of judgment were overruled by the trial court, and the case carried to the United States Circuit Court of Appeals for the Sixth Circuit by a writ of error.

That tribunal affirmed the action of the lower court, and

a petition for writ of error was duly granted, and the case brought to this court.

Numerous exceptions were taken to the rulings of the trial judge upon the admission and exclusion of testimony, the plaintiff being allowed to show, by mere conjecture, the earning capacity of deceased and his behavior and conduct. Certain hypothetical questions were also objected to, as physicians were allowed to indulge in mere speculation, and railway employes were permitted to hazard opinions as to the causes of the accident.

Subsequent repairs to the tank and appliances, alleged to have caused the accident, were also shown over the objections of plaintiff in error. Many other portions of the evidence were also objected to, both as irrelevant and incompetent, as shown more particularly in the assignment of errors.

A peremptory instruction was asked by plaintiff in error, on the ground that negligence had not been fastened upon the railway company, and that the proof showed contributory negligence and assumption of risk by the deceased. This motion was overruled, and the case allowed to go to the jury.

Certain features in the charge of the judge upon the relative duties of the company and its servants were objected to and proper exceptions taken. Special supplementary charges were then asked by plaintiff in error. These charges embodied the theory of defendant, and set out the rules of contributory negligence, assumption of risk and the master's duty in language taken from recognized text books and authorities. All of them were refused by the trial court, and exceptions were taken by plaintiff in error.

At the conclusion of the case, and after the jury's verdict, motions were made to correct the errors assigned. All of these were overruled, and the case brought by way of the Circuit Court of Appeals to this honorable court.

A detailed statement of the errors complained of is found in the following:

ASSIGNMENTS OF ERROR.

I.

The court erred in dismissing the writ of error of petitioner in that it affirmed the action of the Circuit Court of the United States for the Western District of Tennessee, in

overruling the defendant's motion made at the close of the evidence in the Circuit Court for a peremptory instruction in its behalf.

II.

The court erred in affirming the action of the Circuit Court in admitting, over the objection of the plaintiff in error, the following evidence, which appears in the direct examination of Mrs. Bettie C. McDade, a witness for the defendant in error, to-wit:

"Q. Mrs. McDade, what was your husband earning at the time?

"A. Seventy dollars a month.

"Mr. Wright: That is objected to unless she knows of her own knowledge.

"Said objection was overruled by the court, to which ruling the defendant excepted.

"A. Well, they sent me a check.

"Q. Who did?

"A. The Choctaw, Oklahoma & Gulf Railroad Company, after he was dead. I have that at home. It says: 'This is for twelve days' work,' and that was for $37.75.

"Q. They sent you a check for $37.75, which they said was for twelve days' work?

"A. Yes, sir.

"Mr. Wright: That is objected to, on the ground that it does not show his earning capacity, but merely what he earned for twelve days."

III.

The court erred in sustaining the action of the Circuit Court in admitting, over the objection of the plaintiff in error, the following evidence in the direct and re-examination of C. A. Hollowell, a witness for the plaintiff, to-wit:

"Q. Where was he standing to the best of your knowledge at the time he was giving this signal as the train pulled into Goodwin?

"A. From the position of his lamp, and the signal, I should judge he was probably sitting on the edge of the car.

"Q. He was sitting at the time you gave this signal?

"A. I should judge this was his position at this time."

Counsel for defendant objected to this evidence, which objection was overruled, and the defendant excepted.

"How long had the tank been in the condition that it was on the night that this train passed by?

"A. As far as I know, ever since I have passed there.

"Q. State whether or not you had ever made any observation in regard to it personally.

"A. Nothing; only to be careful to be out of the way of it.

"Q. You had to be careful to keep out of the way of it? Did you?

"A. Yes, sir."

These questions and answers were objected to by the defendant; the objection was overruled, and the defendant excepted.

"Q. State what is the usual custom of the head brakeman on your road, and others, in regard to their position on the top of the car when passing stations.

"A. Well, there is no special position at all. They use their pleasure in regard to that.

"Q. What custom, if any, exists in regard to their sitting on the side of the car?

"A. That is the customary position always of a person riding on top.

"Q. Then, at the time that this train pulled into Goodwin, Ark., on the night of August 19th, Mr. John I. McDade was in the customary position while giving the signal to the engineer not to stop at Goodwin, and in the discharge of his duties, was he not?

"A. Well, I will answer that he was in the discharge of his duties.

"Q. He was, at the last time you saw him, in the proper discharge of his duties?

"A. Yes; on top of the train, looking after the train.

These questions and answers were objected to by the counsel for defendant, and, the objection being overruled, the defendant excepted.

"Q. State what his character was with reference to his efficiency, carelessness or prudence.

"A. He was always very careful in handling trains, doing work and anything of that kind."

To this question and answer defendant objected, which objection was overruled, and defendant excepted.

"Q. Mr. Hollowell, please state whether or not you know of any reason in the world why the head brakeman, Mr. McDade, should have been on the side of the ladder, either ascending or descending, as the train was pulling through Goodwin.

"A. I do not know any reason that would necessitate his being on the ladder at all at that time."

To this question and answer defendant objected; which objection was overruled, and defendant excepted.

"Q. State whether or not if he desired to get in such position; that is, to descend on the ladder for the purpose of looking at any thing, or making any investigation, what is customary with reference to carrying his lantern?

"A. He would not have left his lantern there if he had went down the ladder. He would have taken his lantern with him.

"Q. His lantern was, as you have stated, in a position—

"A. That he would naturally place it in after he had finished giving the signal.

"Q. And in the position a brakeman would naturally place it after sitting down on the north, or right hand, side of the grabiron?

"A. It would be, evidently, when he leaned out to pass the signal to the engineer that he would hold the grabiron with his left hand, with his lantern in the right, after being in that position passing it from the side of the car, making it more convenient for the engineer to see him, he would pass the lantern to where his left hand was."

These questions and answers were objected to, and, which objection being overruled, the defendant excepted.

IV.

The court erred in sustaining and affirming the action of the Circuit Court in admitting, over the objection of the plaintiff in error, the following evidence found in the direct and re-examination of R. H. Briggs, a witness for the plaintiff, to-wit:

"Q. Mr. Briggs, describe the relative position, as near as you can, of the water spout with reference to a passing train.

"A. Well, it should be cleared.

"Q. How much should be cleared?

"A. I cannot tell you exactly. I have never located a tank myself. There is a regular standard, and the road department conforms to it. I know that they must absolutely clear it.

"Q. You say they intend and construct the standard tanks so that the spout should be in a vertical position when not in use?

"A. So that it will clear everything.

"Q. What do you mean by everything?

"A. Anything in the way of the car, or a person on top."

The defendant objected to the admission of these ques-

tions and answers, which objection was overruled by the court, and the defendant excepted.

"Q. Now, Mr. Briggs, suppose the spout did not go up to a vertical position; what would that show?

"A. It would show that the weight struck this cross-piece too soon, or that the chain is too long. I could give further information how this does happen.

"Q. Do that.

"A. Oftentimes the spouts get rammed up or smashed through the carelessness of the fireman in taking water, and they have to take the spout off and put another on, and the other spout is generally in the shop ready for an emergency of this kind, and, in making the spouts in the shop, they are not particular in getting the same size, so the band will go a little further and not go down so far, and if they don't go down so far the result is this will strike too soon, and the spout won't go up high enough, and the weights don't come down here by some distance."

All of which evidence was objected to, and, upon the court overruling the objection, the defendant excepted.

"Q. Now, Mr. Briggs, you say the spout automatically goes back to a vertical position when the chains are of the right length and the band around the spout is in proper condition? Now, assuming that the slant of the spout, when the weights rest on the floor or the platform, that is, when the spout is not in use, then the slant amounts to as much as 2 feet and 8 inches—in a length of 9 feet—the slant 2 feet and 8 inches in that length. Please state whether that would conform to the present state of the art of the standard tanks and spouts.

"A. It would not be as I would want to have it."

Defendant objected to this last answer, as well as to the last question, which objection the court overruled, and the defendant duly excepted.

"Q. What is the cause of its being at this angle, so that it would not clear the car?

"A. Different causes. One, the spout might have been damaged, and they had to change it. If the ring of the spout is here and they get another spout with the ring here, that makes the chain too long, and it hangs over. They might put new chains on, but that seldom happens. But the main cause is, the spout gets mashed. The fireman will give the engineer the signal, and the first thing he goes and mashes it, and they get another spout, and the men are not

particular enough about putting this band in the right place, and it will control the position in which the spout hangs."

This last answer was objected to by the defendant; the objection was overruled, and the defendant excepted.

V.

The court erred in sustaining the action of the Circuit Court in admitting the following evidence, over the objection of the plaintiff in error, to-wit:

Said evidence is found in the testimony of W. D. Kennedy.

"Q. Now, from the way the lantern was moving, at the time you saw him giving the signal, what was your best impression at that time as to his position on the car?

"A. Well, now, I'll tell you. It was a warm night—a night, in other words, that was not hard on a brakeman. The brakeman generally sits on the car. It would have been on the west end of the car at the side of the ladder, and I judge he would be sitting down, because it is easier to ride sitting than standing."

Said question and answer objected to by the defendant; the objection was overruled, and the defendant excepted.

VI.

The court erred in sustaining the action of the Circuit Court in admitting, over the objection of the plaintiff in error, the following evidence found in the direct evidence of F. D. Smythe, a witness for the plaintiff, to-wit:

"Q. Doctor, assuming that the man was sitting on the side of the edge of the car, with his legs hanging over the side of the car, the car being between 13 or 14 feet high, and being a part of a train which was running at a rate of speed, say between twenty and twenty-six miles an hour, that he was found on the side of the track, on which the train was moving, in the condition, and with the injuries, such as I have above described to you. Please state whether or not, in your opinion, of a reasonably certain character, whether such condition could or not have been produced by falling from said car in that position on the level ground?"

Counsel for the defendant objected to said question, which was overruled, and defendant excepted.

"A. That is a matter that I cannot give an answer to

with any degree of certainty, for the reason that several things enter necessarily into the infliction of an injury. It is possible."

Counsel for defendant objected to what is possible.

"Q. If you say that you can, with reasonable certainty, give an opinion as to whether those injuries which, as I have described to you, could, or could not, have been produced from falling from the car, running at that rate of speed, under the conditions described, please give such an opinion.

"A. My opinion is that a single blow could not have produced such an extensive injury as you have described. That is all that I can say. My opinion is that a single blow could not have produced such an injury as you have described.

"Q. Doctor, please state whether or not, in your opinion, falling from the side of a car on the ground, where the ground is of such a nature, or surface, as to receive impressions of footprints, whether falling from the side of a car 13 or 14 feet in height would produce such injuries as that."

To this question counsel for the defendant objected; the court overruled the same, and defendant excepted.

"A. It is possible, Mr. Fitzhugh, for an extensive injury to result from a fall of that height, going at the rate of speed and coming in contact with the ground, without some interruption from the fall. I could easily see how a very extensive injury could result, but I cannot see how it could produce such lesions and such things in one blow; but a man going at that rate and falling from that height, it would produce an extensive injury.

"Q. Are these injuries, in your opinion, produced by a blunt instrument? Would a pipe 10 inches in diameter, if a person came in contact with it, while the train was running twenty or twenty-five miles an hour, be such an instrument as would produce such injuries?

"A. There comes the question again. I don't think a blow from the pipe would produce it all; but I am satisfied that a blow from the pipe would produce the injury to the jaw bone. I don't think the scalp wound and the wound on the opposite side of the face could have been from the pipe fixed in an immovable position. It would cause great injury in soft parts."

To this question and answer the defendant objected, and, upon the court overruling the objection, the defendant excepted.

"Q. In your opinion, please state whether or not the condition and injuries described to you could or not have been produced by a combination of blows, viz.: The blow from such a pipe where the party's head comes in contact with it, when he is on a train running twenty or twenty-five miles an hour, and is knocked from the car, after such blow is received, falling to the ground?

"A. Yes, sir. I think the combination of blows would account, under the circumstances, for the condition the man was found in.

"Q. In your opinion, neither the falling from the car, nor the blow from the pipe, under these circumstances, alone could produce that combination of injuries?

"A. Not alone; no, sir. I am not prepared to say what happened when he fell."

To this last question and answer, defendant objected, which objection was overruled, and defendant excepted.

VII.

The court erred in sustaining the action of the Circuit Court in admitting the following evidence, over the objection of the plaintiff in error, found in the direct examination of Dr. Webb, a witness for the plaintiff, to wit:

"Q. Please state whether or not the injuries, such as you have described, and, in addition, assuming that the jawbones were crushed, and that he had a large scalp wound on the left side of his head, near the rear, whether such injuries could have been produced by a fall from a car thirteen or fourteen feet high, running at a rate of speed of twenty to twenty-five miles an hour, if the party were sitting on the side and edge of the car, and fell on level ground, whether these injuries could have been produced by such a fall?

"A. I don't hardly think it could.

"Q. Please state whether or not such injuries as you saw, and, in addition thereto, the injuries which I have just described to you, could have been produced by the party coming in contact with an iron pipe, about ten inches in diameter, and the pipe striking him on the head while in the position on the side of the car, moving at from twenty to twenty-five miles an hour, and his falling thereafter to the ground?

"A. Yes, I think it would, all right.

"Q. But the mere fall, under these circumstances, in your opinion, would not have produced those injuries?"

"A. I don't see how it could; it might have done it."

To all of this evidence the defendant objected, and upon the objection being overruled, the defendant excepted.

VIII.

The court erred in sustaining the action of the Circuit Court in admitting, over the objection of the plaintiff in error, the following evidence, found in the testimony of Frank Sayres, on cross-examination:

"Q. Had this upright, to which the pulleys are attached, and through which the chain passes, which connects with the water spout, been elevated?

"A. It had not been at that time.

"Q. How do you know that it hadn't?

"A. Because I noticed it after it had been done.

"Q. When was it done?

"A. Eight or ten days after I made these measurements.

"Q. Did you see it done?"

Counsel for defendant here objected to any change being shown in the appliances connected with the waterspout after the accident occurred.

"Judge Hammond: What day of the month did you make this measurement, to which you have testified?

"A. It was about the 3rd or 4th of September.

"Judge Hammond: This accident happened on the 18th of August?

"A. Yes, sir.

"Mr. Fitzhugh: Do you know the date when these changes were made?

"A. No, sir, I don't know the date; but in passing there the first time after it was made, I noticed the difference in the spout.

"Judge Hammond: Did you make your measurements before you noticed the change?

"A. Yes, sir."

Counsel for the defendant then asked that the details in the change of the spout be excluded; that what the witness said about noticing changes made in the spout be also excluded. This motion was overruled by the court, and the defendant excepted.

"Judge Hammond: At the time you made these measurements, did you notice any change in this structure, as you knew it before?

"A. If there were any changes, they were so slight I could not detect it.

"Q. Was that the eight or ten days after you took the measurements, that you say you noticed the change?

"A. No, sir. I noticed it on the train in passing, but did not stop off.

"Q. When was that?

"A. I could not give it.

"Q. How many days after you took the measurements before you went back?

"A. It was probably two weeks; maybe more.

"Q. Were you not there eight or nine days after you took the measurements at Goodwin, Ark., after this change —after you took these measurements?

"A. I am not certain. It would be somewhere about that time."

Defendant again objected to this testimony, and, upon the court overruling the objection, an exception was taken.

Continuing, the witness testified as follows, over this same objection of the defendant:

"Q. And you have not, about the time, the days or weeks, any distinct recollection?

"A. I can say I am certain it was twelve or fourteen days after I took the measurements that I noticed the change."

IX.

The court erred in sustaining and affirming the action of the Circuit Court in excluding the following evidence of W. W. Sherwood, a witness for the plaintiff in error, which appears on his re-examination, as follows:

"Q. I will ask you this hypothetical question: Suppose Mr. McDade was sitting on the side of the car, and was sitting on the north side facing north, the car going west, and the tank spout being situated on the north, if he was struck by that spout, would you say, from your familiarity with people being knocked off of trains, and falling bodies of that character, and from the situation in which he was found, 675 feet west of the tank, where the spout hit him, that he could have been knocked off by the spout?"

Counsel for plaintiff objected to this question and answer, and the objection was sustained by the court, to which defendant excepted.

The defendant then requested the court to allow him to repeat the question, with the element of the hypothetical

question that the train was going twenty-five miles an hour. This request was refused, and defendant excepted.

X.

The court erred in sustaining the action of the Circuit Court in admitting, over the objection of the plaintiff in error, the following evidence, found in the cross-examination of G. P. Poole, a witness for the defendant:

"Q. Was the change made under your supervision?

"A. Yes, sir.

"Q. When was that change made?

"A. It was somewhere from the 5th to the 20th of September; probably a little later.

"Q. The 5th to the 20th of September, 1900?

"A. Yes, sir.

"Q. You can't get it nearer than that?

"A. I can't, from memory. I can say, however, after the 5th, because the man who done the work did not commence until the 5th, and it was some days after he commenced that he made the change. I think it was probably five or six days after the 5th."

These questions and answers were objected to, and, upon the said objection being overruled, the defendant excepted.

"Q. Did you give any specific instructions as to the changes to be made on this spout and its appliances in September, 1900?

"A. I gave a letter; I wrote a letter to all the foremen.

"Judge Hammond: Did you give any specifications to work by?

"A. Just a letter; nothing else, only what I have stated.

"Q. Do you know, of your own personal knowledge, that these changes, if any, were made?

"A. Just what the men reported to me.

"Q. Weren't you there last night?

"A. Yes, sir.

"Q. Do you know whether they were made or not?

"A. I know there is a mark there; it looks to me like it had been made."

To this last answer the defendant objected.

The court then spoke as follows: "If this company has changed this structure in such a way that we cannot get at all the measurements that existed on the 18th of August, except by comparison, I'll let that change go in. You may show the measurements that existed on the 18th of August."

The defendant objected to this line of inquiry. Upon the court's overruling the exception, defendant duly excepted.

The defendant also objected to the following questions and answers:

"Q. Didn't you get up and look, and say a few moments ago that the bar had been elevated?

"A. Yes, sir; to the best of my judgment, three inches.

"Q. The cross-bar? That is, the one upon which the pulleys hang and over which the chains run and connect with the pipe?

"A. Yes, sir.

"Q. To the best of your knowledge, that cross-bar has been elevated three inches, under the instructions given by you in September; it had been raised three inches?

"A. I judge so.

"Q. What effect would the raise of the cross-bar, lifting that three inches, have upon the chain and spout; how much, in other words, would that shorten the chain?

"A. Well, it would be guess work.

"Q. Is it not a fact that that would shorten the chains twice the amount of the elevation of the bar?

"A. Yes; it would seem so.

"Q. That it would carry the point of the spout, the nozzle, back about six or seven inches?

"A. Yes, sir; that is my idea.

"Q. Or make it much shorter, which?

"A. Carry it back; it would raise it, certainly."

The objection of the defendant was overruled as to these questions, and the defendant excepted.

XI.

The court erred in sustaining the action of the Circuit Court, and affirming same in charging the jury, as follows:

"But if you find, from the evidence, that his death was caused by collision with the overhanging waterspout, either by a blow sufficient of itself to kill him, or by being so dazed and disconcerted by a blow from the spout or the overhanging chain, that he was either precipitated from or fell from the cars with sufficient force to kill him, the company would then be liable to his widow and their children in such damages as are given by the statute of Arkansas, which was been read in your hearing."

To this portion of his honor's charge exception was duly taken by the defendant.

XII.

The court erred in sustaining the action of the Circuit Court in charging the jury as follows:

"I shall not delay your consideration of this case by reviewing any arguments of fact or law involved in it, since that has been so well done by counsel on either side; and since, moreover, interesting as it is, the case presents no serious application of either fact or law requiring the court's attention. As you have observed, there is much conflict of judicial opinion in deciding the cases analogous to this in fact and law, but the court here has taken its responsibility, as once before in another case, to decide that it is negligence of itself for a railroad to so construct such appliances as that we have before us, that they will injure the brakemen upon its trains. It is so simple a task, one so devoid of exigencies of expense, necessity or convenience, so free from any consideration of skill, except that of the foot-rule, and so entirely destitute of any element of choice or selection, that not to make such a construction safe for the brakemen on the trains is a conviction of negligence. Therefore, I submit the case to you upon the plain proposition above mentioned. I repeat:

"First—Was McDade killed by the collision with the spout, or its chain, either directly, or by a fall, in consequence of a collision with either of them?

"Second. Did he know of the danger at the time, or might he have known it if he had been using ordinary care to inform himself of that danger, either before or at the time of the accident? If you find both of these propositions in favor of the plaintiffs, they should recover."

To which exception was taken at the time by the defendant.

XIII.

The court erred in sustaining the action of the Circuit Court in refusing to give the following special instructions of the plaintiff in error, after the judge had delivered his general charge:

"The court charges you that the defendant railroad company was obliged to use ordinary care in the selection and construction of the water tank and its appliances at Goodwin Station; that is, it was obliged to use ordinary care to select such an appliance, and to so construct it that it would not necessarily endanger its employes, whose duties required them to pass by it; but, as between the defendant

and the deceased, the defendant was not bound to construct and use such appliances as were of the best or most improved pattern, if these appliances were such at the time of the death of McDade as were in general use; that is all that can be required of the defendant; so, in order that the plaintiff can recover in this case, it is necessary for the plaintiff to convince you by the preponderance of the evidence, that the construction and location of the water tank, or its appliances, were such as were not in general use throughout the country. So, if you believe, from the evidence, that the defendant did use ordinary care and prudence in the selection, arrangement and care of the water tank at Goodwin Station, and that such a tank was one which, in the experience of the railroad business, was reasonably safe, then there can be no recovery in this case. Ordinary care is that degree of care which an ordinarily prudent man engaged in a like business would use under the circumstances of the case, and the test of what is ordinary care is this: Whatever is according to the general, usual and ordinary course adopted by those in the same business is reasonably safe, within the meaning of the law, and, hence, is the test of what is ordinary care."

XIV.

The court erred in sustaining the action of the Circuit Court in refusng the following special instructions, requested by the plaintiff in error, after the circuit judge had given his general charge, which is as follows:

"Where there are several general methods in use, it being a matter of judgment, depending upon surrounding conditions, the defendant has an absolute discretion to select according to his own judgment. The test of liability is not danger, but negligence, and negligence can never be imputed from the employment of methods, appliances and machinery, which are in general use in the business; so, if you believe, from the evidence, on some railroads sway spouts of tanks were hung in a vertical position and upon other well-regulated railroads the sway spouts upon water tanks were hung at an angle, similar to the angle at which the sway spout upon the Goodwin tank was hung, then the defendant has fulfilled the requirement of the law, and, no matter whether the deceased was killed by coming into contact with the spout or not, there can be no recovery in this case."

XV.

The court erred in sustaining the action of the Circuit Court in refusing the third special instruction requested by the plaintiff in error, after the circuit judge had delivered his general charge, and which is as follows:

"The defendant did not undertake with McDade that it would use the very best water tank and appliances; nor was the defendant called upon to discard the same, if it was reasonably suitable for its business, though there were other water tanks that were safer. If you believe, from the evidence, that this tank and its appliances were reasonably suitable and reasonably safe, you should find for the defendant."

XVI.

The court erred in sustaining the action of the Circuit Court in refusing to give the fourth special instruction requested by the plaintiff in error, which is as follows:

"If you believe, from the evidence, that the sway spouts upon the various well-regulated railroads of this country were hung at different angles, and projected towards the track at different distances, and you likewise believe, from the evidence, that the method of hanging the sway spout at Goodwin was in common use by many of the well-regulated railroads of this country, then you should find for the defendant, even though you believe that the defendant made an error of judgment in selecting one method of hanging sway spouts instead of selecting another method of hanging this appliance, if you believe that both methods are in common use."

XVII.

The court erred in sustaining the action of the Circuit Court in refusing to give in charge the plaintiff in error's special instruction number five, which is as follows:

"It is the duty of the master to use ordinary care to furnish machinery and appliances reasonably safe and suitable for the use of the servant; that is, such as, with reasonable care upon the part of the servant, can be used without danger to him, except such danger as is incident to the business in which such instrumentalities are employed; so, also, it is the duty of the master to provide a reasonably safe place in which the servant can perform his work, and to keep it in such suitable condition. The duty is not absolute, but relative. It is measured by the nature and char-

acter of the employment, the location of the premises and the surroundings. There are employments that are of themselves dangerous, in connection with which no position can be made secure. In such cases the law only requires of the master that he use ordinary care that the dangers of the employment are not unnecessarily enlarged; that he shall take proper care to furnish such safeguards as are customarily employed in the performance of like hazardous service, so that the servant exercising proper care may render his services without exposure to dangers that are not within the obvious scope of the employment as usually carried on.

"The master may, however, conduct the business in the way that to him seems best, although other ways may be less hazardous, and still not be liable in damages. In such a case, if the servant knows the danger attendant upon such manner of prosecuting the work, he assumes the risk of the more hazardous method.

"Therefore, the servant, upon his part, assumes the natural and ordinary risks attendant upon his employment. He does not, however, assume unusual and extraordinary risks, of which the master knew, or should have known, or foreseen, unless such risks are obvious, or the servant has actual knowledge or presumed knowledge of the danger.

"It is likewise the duty of the servant to use ordinary care to ascertain what the dangers are attendant upon the services in which he engages, and it is likewise his duty to protect himself against known dangers, and such dangers as can, by the use of ordinary care, be ascertained; and his duty is just as imperative upon him as that laid upon the master."

XVIII.

The court erred in sustaining the action of the Circuit Court in refusing to give the special instruction number six of plaintiff in error, as requested in its original form, and likewise erred in sustaining the Circuit Court in its modification of the same. Said special instruction, in its orginal form, was as follows:

"If you believe, from the evidence, that the sway spout was hung at an improper angle, and too near the track, and you likewise believe, from the law as above given, that the defendant was guilty of negligence in so hanging such spout, but you likewise believe that McDade was an experienced brakeman, and that he knew, or, by the exercise of ordinary care, should have known of the danger incident to

the construction and location of the sway spout, and that after he knew, or by the exercise of ordinary care should have known such fact, he voluntarily continued in the employment of the defendant railroad company, then the court charges you that he assumed the risk of whatever defects there were in the construction and location of the tank, and its appliances, and there can be no recovery in this case."

The court gave this instruction to the jury, with this addition and modification, immediately following the conclusion, to-wit:

"But the given danger must have been one open to ordinary observation, and not one lurking or hidden from the view."

XIX.

The court erred in sustaining the action of the Circuit Court in refusing to give in charge the eighth special instruction requested by the plaintiff in error, which is as follows:

"If you believe, from the evidence, that both the defendant company and McDade were equally competent to judge of the risks and hazards incident to the passing of cars—the sway spout at Goodwin Station—hung as it was prior to the death of McDade; and you likewise believe, from the evidence, that both of them had equal knowledge of the surroundings, the defendant cannot be held liable in damages, although the sway spout was dangerous, and although it might have been made safer by the defendant if it chose to do so."

XX.

The court erred in sustaining the action of the Circuit Court in refusing to give in charge the ninth special instruction requested by the plaintiff in error, which is as follows:

"If you believe, from the evidence, that the deceased, McDade, had an equal opportunity with the defendant for observing the sway spout and the manner in which it was hung at Goodwin Station, prior to his death, and that McDade had likewise an equal opportunity of apprehending the dangers incident to the passing underneath the sway spout upon freight cars, and, with this knowledge, continued in the service of the defendant company, then there can be no recovery, although you believe that the defendant was negligent in the way in which it constructed and hung the sway spout. In this connection the court

charges you that knowledge is either actual or presumed; that is, in the law, McDade is presumed to have had knowledge of those facts, which he should have known by the exercise of ordinary care."

XXI.

The court erred in sustaining the action of the Circuit Court in refusing to give the tenth special instruction requested by the plaintiff in error, in its original form, and in giving it as modified. The tenth special instruction is as follows:

"If you believe, from the evidence, that McDade was an experienced brakeman before he entered into the service of the Choctaw, Oklahoma & Gulf Railroad Company, and that, prior to his death, he had been in the employment of this railroad company for several months, a portion of which time he ran over what is known as the western division of the road, and a portion of which time he ran over what is known as the eastern division of the road, and if you likewise find, from the evidence, that the tanks on the western division of the road, as well as the tanks on the eastern division of the road, were constructed similar to the construction of the Goodwin tank; and that the sway spout upon all of these tanks were hung, when in proper position, at the same angle, then you are to say whether or not an experienced brakeman, having the opportunities that McDade did have, and passing these tanks as McDade did pass them, should, by the exercise of ordinary care, have been able to determine the dangers incident to passing underneath them upon freight cars. If you believe, from the evidence, that he should have had this knowledge, and, with this knowledge, continued in the service of the defendant company, then he is presumed to have assumed the risk, and there can be no recovery in this case. In this connection, the court likewise charges you that you may take into consideration the frequence or the infrequency in which furniture cars of a like height and width as the car upon which McDade was riding when killed were used over the defendant road."

The court modified this instruction, by striking out the words "similar to," and adding, instead thereof, the words "precisely as found in." The court likewise interpolated, after the word "determine," the following phrase, "from his observation or experience while engaged in the business of the company." So, then, the entire sentence, as

modified, and of which complaint is made, read, as changed by the court, as follows: "A portion of which time he ran over what is known as the western division of the road, and a portion of which time he ran over what is known as the eastern division of the road; and if you likewise find, from the evidence, that the tanks on the western division of the road, as well as the tanks on the eastern division of the road, were constructed *precisely as found in the* construction of the Goodwin tank, and that the sway spouts upon all of these tanks were, when in proper position, at the same angle, then you are to say whether or not an experienced brakeman, having the opportunities that McDade did have, and passing these tanks as McDade did pass them, should, by the exercise of ordinary care, have been able to determine, from his observation or experience while engaged in the business of the company, the dangers incident to passing underneath them upon freight cars."

XXII.

The court erred in sustaining the action of the Circuit Court in refusing to give the twelfth special instruction, requested by the plaintiff in error, which is as follows:

"If you believe, from the evidence, that the sway spout at Goodwin Station was not such a sway spout as was in common use, and that the defendant was negligent in the manner in which it constructed this spout, but you likewise believe, from the evidence, that neither the defendant nor the deceased should, by the exercise of ordinary care, have known of the danger incident to the construction and location of the spout, then there can be no recovery."

XXIII.

The court erred in sustaining the action of the Circuit Court in refusing to give the thirteenth special instruction, as requested by the plaintiff in error, which is as follows:

"The defendant is not liable for an injury sustained by its servant in the course of his employment, when the danger is of such a character that it must be just as open, obvious and apparent to the servant as to the master, or when it is such that it cannot be ascertained by either in the exercise of reasonable care and prudence."

XXIV.

The court erred in sustaining the action of the Circuit Court in refusing to give the sixteenth special instruction, requested by the plaintiff in error, which is as follows:

"The defendant, in the erection, construction and location of the Goodwin tank, was only required to use reasonable care to furnish a safe tank, that would be safe under all circumstances, but was only required to use reasonable care to make the tank safe for those of its servants who, as they passed the tank, were in the exercise of ordinary care upon their part; so, if you believe, from the evidence, that the deceased was struck by the tank, but that he did not use ordinary care in the position in which he was sitting or standing on the car, then you should find for the defendant."

XXV.

The court erred in sustaining the action of the Circuit Court in refusing to give the seventeenth special instruction, requested by the plaintiff in error, which is as follows:

"If you believe, from the evidence, that McDade knowingly selected a dangerous place as he passed under the Goodwin tank, when a safer place was apparent to him, and he was thereby injured, then he is guilty of contributory negligence, and cannot recover, even though you believe that the defendant was likewise negligent."

XXVI.

The court erred in sustaining the action of the Circuit Court in refusing to give the eighteenth special instruction, requested by plaintiff in error, which is as follows:

"If you believe, from the evidence, that McDade, as he passed the Goodwin tank, had a choice of several ways in which to stand or sit upon the car, one or more of which was perfectly safe, and one of which was subject to danger or risk, he voluntarily chose the latter, and was injured, he was guilty of contributory negligence, and cannot recover."

XXVII.

The court erred in sustaining the action of the Circuit Court in refusing to give the nineteenth special instruction, requested by the plaintiff in error, which is as follows:

"While the evidence shows that, on ordinary occasions, it is customary for brakemen to sit upon the side of the

car, you are to say, from the evidence, whether or not McDade was guilty of negligence in sitting upon the side of the car as it passed the Goodwin tank; and, in order to determine this question, you should take into consideration all of the facts in the case. If you believe, from the evidence, that the engine whistled for the Goodwin tank; that McDade had been over the road many times before, and had passed the Goodwin tank; that he had an opportunity to observe the dangers and risks incident to the way in which the spout was hanging; and you likewise believe that an ordinarily prudent man, situated as McDade was situated, would have observed such risks and dangers; and you likewise believe that an ordinarily prudent man, from his familiarity with the road and the signals given, should have known and recollected that he was passing the Goodwin tank; and you likewise believe that McDade could have passed the Goodwin tank by occupying a different position with perfect safety; and, in fact, from all the circumstances in this case, if you believe that an ordinarily prudent man would not have acted as McDade did act, and that this was one of the producing causes of the injury, then there can be no recovery, although you believe that the defendant company was guilty of negligence."

XXVIII.

The court erred in sustaining the action of the Circuit Court in refusing to give the twentieth special instruction, requested by the plaintiff in error, which is as follows:

"If you believe, from the evidence, that McDade was an experienced brakeman before he entered into the service of the defendant; that he was a man of mature years, and capable of observing whether or not a sway pipe spout was dangerous; and you further believe that, whatever dangers were incident to the use of the Goodwin tank, and its appliances, were just as open and obvious to McDade as they were to the defendant company, then there was no duty incumbent upon the defendant company to warn McDade with regard to the dangers."

XXIX.

The court erred in refusing to grant a motion for a new trial.

XXX.

The court erred in refusing to grant a motion in arrest of judgment.

BRIEF OF THE ARGUMENT

OF PLAINTIFF IN ERROR.

I.

The court erred in overruling the defendant's motion, made at the close of the evidence, for a peremptory instruction in its behalf. It will be noted, on page 205 of the Record, that at the conclusion of the evidence in this case the defendant requested a peremptory instruction in its favor, which request was refused by the court, and to which the defendant then and there excepted. In the consideration of this assignment, it is necessary to review the evidence of this case in the light of two rules of practice, uniformly held by this honorable court, viz.:

First—That it is the duty of the trial judge to withdraw the case from the jury, and direct a verdict for the plaintiff or defendant, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. Railroad vs. Converse, 139 U. S., 469; Insurance Co. vs. Doster, 106 U. S., 32; Griggs vs. Houston, 104 U. S., 553; Randall vs. Railroad, 109 U. S., 478; Schofield vs. Railroad, 114 U. S., 615.

As is well expressed in Railroad vs. Bank, 123 U. S., 727: "Such a direction is eminently proper when it would be the duty of the court to set aside a different verdict, if it were rendered. It would be an idle proceeding to submit the evidence to the jury when they could justly find only in one way."

Second—In personal injury cases, upon appeal, it is only where all reasonable men would agree that the evidence was insufficient to warrant a verdict, that the court is justified in withdrawing the case from the jury. Manufacturers' Co. vs. Ins. Co., 9 C. C. A., 12.

We submit, therefore, that all reasonable men would agree that the evidence in this case was insufficient to warrant the verdict rendered by the jury in the case at bar, and upon the following propositions:

First—That the plaintiffs' sole allegation of negligence was based upon the theory that the deceased had been

killed by a blow, from coming in contact with the sway spout, and, therefore, the burden of proof was cast upon the plaintiffs to sustain this allegation as a preliminary consideration, before considering the question of the negligence of the defendant in the construction and maintenance of such a sway spout.

Second—If the jury was justified in finding, from the evidence, that the deceased was killed by the sway spout, it became the duty of the jury to consider the following proposition, to sustain which the burden of proof was upon the plaintiffs, to wit: First, it was incumbent upon the plaintiffs to show, by a preponderance of the evidence, that the defendant failed to exercise ordinary care to provide its servant, the deceased, with safe and suitable instrumentalities to work with, or, more correctly speaking, a safe and suitable place in which to perform his duties, in that it negligently constructed and maintained its water tank and appliances at Goodwin Station. Second, if the jury was justified in finding that the defendant did negligently construct and maintain the sway spout at Goodwin Station, and thus failed to perform the duty that it owed to the deceased, it was still incumbent upon the plaintiffs, before there could be any recovery, to show, by a preponderance of the evidence, that the deceased had not assumed the risk of any danger arising from such negligence.

Third—If all of the foregoing questions were decided in favor of the plaintiffs, there still could be no recovery, and a verdict should have been directed by the court, if all reasonable men would agree that the deceased was guilty of contributory negligence, in which case, however, the burden of proof was cast upon the defendant.

We will discuss each of these questions in their regular order.

First, was there sufficient evidence to go to the jury upon the question as to whether or not the deceased was injured by the sway spout? It is admitted that there were no eye-witnesses to this accident. The last seen of McDade was the waving of his lamp, given from the train when the train was about a half mile west of Goodwin tank. (Record, pp. 37-81, 82, 83, 84, 149 and 150.)

When McDade gave this signal he was either standing or sitting upon one of the freight cars about ten cars from the the engine. (Record, pp. 40 and 82.)

Whether McDade was standing or sitting down when he gave this signal is left in doubt, as the two witnesses who

saw the signal state that they suppose he was sitting down, because it was a warm night, and it was more convenient for the deceased to sit down than to stand up. (Record, pp. 41 and 84.)

Likewise, one of the witnesses, Hollowell by name, testifies, on page 56 of the Record, that, with regard to his testimony concerning the position of McDade, it was mere speculation upon his part. (In support of this statement see pages 42, 44, 55, 56, 60, 70, 84, 86 and 101 of the Record.) Nothing more was seen of McDade, and his absence did not attract attention, until the train reached Brinkley Station, nine miles west of Goodwin. There the train stopped, and the absence of McDade was noted. (Record, pp. 41, 42, 43 and 92.)

The deceased was found 675 feet, by actual measurement, west of the Goodwin tank. (Record, pp. 58, 59, 145, 146 and 147.)

The testimony is in conflict as to whether or not McDade could have been struck by the sway spout sitting upon the side of the car, and, indeed, nothing can be determined from this evidence, since it largely depended upon the position, with regard even to inches, which he occupied. The proof shows that McDade had his chin crushed to the bone, his teeth knocked out, and on the side of his face his ear drum was bruised, which bruise was upon the left side. He likewise had a blow upon his chin, and a place on his forehead. There is other testimony to the effect that the jawbones on both sides were broken, that he had a slight wound on the left side of the head, near the rear, which did not amount to much.

See testimony of A. L. and R. S. Stephens, page 17; likewise the testimony of Mrs. McDade, page 16 of the Record.

These being the injuries proven, counsel for plaintiffs below assumed in the hypothetical question to Dr. Frank Smythe, pages 120 and 121, that he likewise had a blow upon the top of the head, but near the right side, and that there was a slight wound near the right side of the head near the rear, and, from the fact of these various wounds, asked him whether or not the injury could have been caused by merely falling from the car. The doctor first stated that he could not answer this question with any degree of certainty, but merely stated that his evidence would deal with possibilities. (Record, p. 104.)

Later, on page 105 of the Record, this same physician does state, in his opinion, these injuries could not have been produced by a single blow.

Dr. Webb, the only other medical expert introduced in this case, testified, on page 109 of the Record, that he only made a superficial examination of the deceased in his coffin, but from that he did not see how one blow could have produced the injury that he saw, but it might have done it. (Record, p. 110.)

This same physician, however, likewise admitted that a person might fall from the car and strike the side or edge of the car and then strike the ground, and thus cause the injuries the deceased sustained. (Record, p. 110.)

Dr. Smythe likewise testified on cross-examination, page 107, that the deceased must have become unconscious immediately upon being stricken, and have remained so until his death. He likewise states, on page 108, that he thinks the fractures could have been produced by falling from the height given, as there was a very tremendous force exerted by a man falling from the height he fell, but that the multiplicity of lesions led him to believe that there must have been more than one blow inflicted. This being all the evidence upon this point which even remotely had any bearing upon it, we submit, is not sufficient to justify any reasonable man in coming to the conclusion that the plaintiffs had sustained the burden of proof upon this proposition, irrespective of any evidence introduced by the defendant.

In the first place, is it possible that a man could be stricken a blow sufficient in force to render him immediately and profoundly unconscious and still retain his position upon the top of a car, with practically no support, which freight car was moving at about twenty-five miles an hour, until he, the deceased, had traveled a distance of 675 feet?

Again, if the spout had stricken him, would he not have been immediately knocked off of the car? This spout consisted of galvanized iron, was from 10 to 12 inches in diameter, and 9 feet long.

Again, if he had been stricken by the dangling chains with sufficient force to have dazed him, and then fell from the car, certainly he would not have held on a distance of 675 feet. Then, again, there were absolutely no evidences found upon the car which in any wise tended to show the fact that McDade had been struck by any object which projected toward the track. Nay, indeed, the searchers, who

held lighted torches, found nothing which would indicate the previous presence there of McDade, since there was no disturbance of either the dust or cinders which had accumulated thereon, nor were there any blood stains or other marks of that kind. (Record, pp. 47, 168, 155 and 156.)

It is likewise shown that the swinging motion of the car was great, and, indirectly, that brakemen frequently fall from moving cars.

Now, there was no necessity for McDade to have been in a position to have been struck, so far as the discharge of his duties were concerned. The position in which his lantern was found clearly showed that he had finished giving his signal and had performed all of the duties necessary to be performed in passing the Goodwin tank. And it is likewise admitted that the position on a car occupied by the brakeman was usually left to the brakeman's discretion, it being generally the duty of the brakeman to perform his duties in a careful, prudent manner, but the specific manner of the performance is left to his discretion. (Record, p. 46.)

It is likewise shown that it is the duty of the brakeman and all other employes to keep a careful lookout for projections toward the track, and it is likewise shown that McDade was an old, experienced railroad man, thoroughly familiar with the Goodwin tank, having passed there in the day and night many times prior to the night of the accident, and upon trains in which were located cars of similar height and structure to the one upon which he was standing or sitting when he fell from the car. (Record, pp. 45, 54.)

Without further discussion, we submit that, giving the plaintiff the benefit of every legitimate conclusion which could be drawn from this evidence, the most favorable aspect in which their case can be viewed is that it was possible that McDade was struck by the spout.

If, however, we go a step further and should agree, for the sake of argument, that it was equally as probable that McDade was struck by the spout, as it was that McDade was not struck by the spout, still there could be no recovery. Now, if McDade was standing up, he could not have been struck unless he had been standing upon the very edge of the car, which would have been impossible. Also, if McDade had been sitting with his head leaning toward the south, he would not have been struck; and, in short, there is only one position in which McDade could have been sitting and have been struck by the spout, viz.: Leaning over, with his head toward the tank. It will like-

wise be remembered that the lantern, which was found 10 or 12 inches south of the north edge of the car, was evidently placed by McDade's side, and shows that he was not sitting directly on the north edge of the car, but some little distance back.

In conclusion of argument upon this point, we summarize as follows:

First—That the law requires more than mere possibilities, and that the plaintiffs have only proven a possibility.

Second—That if the plaintiffs have proven a probability, the whole evidence clearly shows that the defendant has proven an equal probability to offset that of the plaintiffs, viz., that the deceased was not struck by the sway spout. In direct support of this assignment, we quote at some length from the case of Hughs vs. Railroad, 91 Ky., 526, syllabus: "In an action to recover damages for any injury arising from the defendant's neglect, the burden of showing neglect is upon the plaintiff; and if the evidence shows that the injury resulted from one of two causes, only one of which was due to the defendant's negligence, and the inference that the injury resulted from the one cause is no stronger than that it resulted from the other, the plaintiff has failed to make out his case, and it is not competent for the court to leave the question to the jury."

Second—"After a freight train had passed through several tunnels in close succession, a brakeman was found upon the top of one of the box cars, which was higher than an ordinary box car, in a dying condition. There were loose timbers hanging from the roof of one of the tunnels, and the theory of the plaintiff is that his intestate was struck by one of these timbers, while the theory of the defendant is that his injury was due to his failure to take the usual precaution to sit or lie down by the brakes in passing through the tunnels, it being impossible to pass through one of the tunnels standing upon an ordinary box car. The evidence does not show the position of the loose timbers in the tunnel in which the plaintiff claims the accident occurred. Held: There is nothing to show that the injury occurred in the tunnel in which the hanging timbers were; and, even if there were, there is nothing tending to show that it was caused by the hanging timbers; therefore, the court did right in giving a peremptory instruction to find for the defendant."

The court, speaking through Chief Justice Holt, uses this language: "Mary Hughs, widow of William Hughs, sues

for damages upon the ground that his death resulted from the willful neglect of the appellee. At the close of her testimony the lower court peremptorily directed the jury to find for the company. If a prima facie case had been made out, or if, indeed, there was evidence tending in any degree to show a right of recovery, this was error. The deceased was a brakeman upon appellee's road; he had been so for nearly a year; during the time he had passed over the portion of the road where he was killed once, and sometimes more than once, per day. * * * * If the deceased, knowing he could not pass through these tunnels standing on the top of the car, neglected to take the usual precautions of stooping or sitting down, there can be no recovery. There is no evidence showing whether he was thus injured, or whether it was caused by the alleged hanging timbers. We are left, therefore, to theorize as to this. One suing to recover damages from injury arising from conscious neglect must offer some testimony conducing to show it was so occasioned. Negligence cannot be presumed in a case like this one. The presumption is the other way. It cannot be found without evidence. The complaining party must not only show the injury, but also some evidence that the other party is to blame for it. Mere proof of injuries, with attending circumstances, showing that the party charged with neglect may be blameless, or may be at fault, will not do. Circumstances are merely presented upon which one may theorize as to the cause of the accident. The burden of showing neglect rests upon the complainant, and under such circumstances he has offered no evidence tending to show it. He has merely presented two or more states of cases, upon which we may theorize as to the cause of the accident. Here, first, the deceased may have been struck by the low roof of tunnel No. 7; or, second, by that of No. 6; or, third, by the hanging timber in No. 7; and only in the latter case could there be any liability upon the part of the company. * * * * It was said, in Cotton vs. Wood, 8 Common Bench (N. S.), 568, and cited with approval in Thompson on Negligence, 364: 'I wish merely to add that there is another rule of the law of evidence, which is one of first importance, and fully established in all the courts, viz., that when the evidence is equally consistent with either view—with the existence, or non-existence, of negligence—it is not competent for the judge to leave the matter to the jury. The party who affirms negligence has altogether

failed to establish it. This is a rule which ought never to be lost sight of.'

"When it is necessary to show a certain state of facts, it is not sufficient to prove two or more different states of cases, one of which may be sufficient, but either of which may equally, under the testimony, have existed. In Hays vs. Railroad, 97 N. Y., 255, it is said: 'If the accident did not result from the complainant's negligence, which is questionable, he must prove something which warrants the inference of the defendant's negligence, and not leave his case upon facts just as consistent with care and prudence as with the opposite.' The case of Beaulic vs. Railroad, 59 N. Y., 537, and Railroad vs. Shertle, 2 A. & E. R. R. Cas. (O. S.), 158, announces the same rule, and, in our opinion, it is a safe and correct one."

If, however, we are mistaken in the assumption that all reasonable minds must come to the conclusion that we have arrived at in the discussion of this proposition, we submit that the evidence which carried this proposition against the defendant before the jury, was largely made up of speculation and theory, and was thus incompetent, as contended in assignments three, four, five, six, seven, nine and ten, and on principle, when an appellate court sees that, but for the admission of incompetent evidence, there should have been a verdict for the defendant, it will declare the action of the trial judge, in allowing the case to go to the jury, reversible error.

NO NEGLIGENCE IN CONSTRUCTION AND MAINTENANCE OF APPLIANCES.

We will now take up the second proposition, to-wit: The error of the trial judge, in refusing to direct a verdict for the defendant, upon the ground that the evidence was insufficient to sustain the burden of proof, that the maintenance and construction of such a sway spout as the one at Goodwin Station, proved negligent conduct upon the part of the defendant.

This brings us to a brief discussion of the principles underlying the relation of master and servant:

First—What was the duty of the defendant to the deceased, under the particular circumstances of this case?

Since this principle has been so clearly announced by this court, we will content ourselves with quoting from the case of Reid vs. Stockmeyer, decided by Justices Harlan,

Woods and Jenkins, in 20 C. C. A., 383: "It is the duty of the master to use ordinary care to furnish machinery and appliances reasonably safe and suitable for the use of the servant, such as, with reasonable care upon the part of the servant, can be used without danger, except such as is incident to the business in which such instrumentalities are employed. So, also, it is the duty of the master to provide a reasonably safe place in which the servant may perform his work, and to keep it in suitable condition. This duty is not absolute, but relative. It is measured by the nature and character of the employment, the location of the premises, and their surroundings. There are employments that are, in themselves, necessarily dangerous, in connection with which no position can be secure. In each case the law requires of the master that he shall use ordinary care to see that the dangers of the employment are not unnecessarily enlarged; that he shall take proper care to furnish such safeguards as are customarily employed in the performance of like hazardous service, so that the servant, exercising proper care, may render his services without exposure to dangers that are not within the obvious scope of the employment, as usually carried on." Coombs vs. Cordage Co., 102 Mass., 572; Burkey vs. Anderson, 10 C. C. A., 442.

"The master may, however, conduct his business in the way that seems to him best, although other ways may be less hazardous, in which case, if the servant knows the danger attendant upon such manner of prosecuting the work, he assumes the risk of the more hazardous method." Quoting: Tuttle vs. Railroad,, 122 U. S., 189; Railroad vs. Seeley, 152 U. S., 145; Naylor vs. Railroad, 53 Wis., 661; 73 Wis., 404; 78 Wis., 127; 90 Wis., 113; Sullivan vs. Mfg Co., 132 Mass., 396; 144 Mass., 601; 119 Pa. St., 324; 47 Minn., 128; 75 Md., 464; 120 Ind., 314.

"The servant, on his part, assumes the natural and ordinary risks attendant upon his employment. He does not, however, assume unusual and extraordinary risks, of which the master knew, or should have known, or foreseen, unless such risks are obvious, or the servant has actual or presumed knowledge of the danger. It is the duty of the servant to use ordinary care to ascertain the dangers attendant upon the service in which he engages, and to protect himself against known dangers, and such as can, by ordinary care, be ascertained. This duty is as imperative upon him as is the duty laid upon the master."

Since, we consider, this exposition of the law states the principles underlying the relation of master and servant as clearly as any we have ever perused, we will set it up as a standard, and measure by it the evidence introduced in this case, calling attention, at the same time, to the case of Logging Co. vs. Snyder, 20 C. C. A., 393, wherein Justice Jenkins adds more learning to this branch of the law, as follows: "The servant of mature age and of experience is charged by the law with knowledge of obvious dangers, and of those things which are within common observation, and are according to natural law. In such case, the master need not give warning of possible danger, of which both parties had equal knowledge." Citing a number of authorities.

"While it is the duty of the master to provide such appliances as are suitable and reasonably safe, that duty is one of ordinary care. The master is not required to employ the best, or the safest, or the newest appliances, but such as can, with reasonable care, be used without danger, such as is reasonably incident to the business. He is bound, as is the servant, to use ordinary care, and with respect to safeguards, when dangerous machinery is employed, the test of care is the ordinary, prudent usage of the business."

We submit that the evidence in this case, viewed most strongly in the light favorable to the defendant in error, was insufficient to prove negligence in the construction and maintenance of this tank, since the test of negligence is the ordinary and prudent usage of the business—what safeguards are commonly adopted by those in like business. The defendant introduced the evidence of many witnesses to the effect that the water tank at Goodwin, both with regard to its construction and maintenance, and especially with reference to the construction and maintenance of the sway spout, was just such as is generally in use on well-regulated railroads throughout the country; and this testimony came from witnesses introduced by the plaintiff, as well as from those introduced by the defendant. These witnesses testified:

First—That of necessity all sway spouts must hang at an angle, because otherwise it would be most inconvenient, if not impossible, for employes upon the engine to pull the sway spout down by the small chains attached thereto so as to put it into service.

Second—That the tank, with all of its appurtenances at Goodwin, including the sway spout and the angle at which

it was hung, was just such a structure as was generally used upon well-regulated railroads throughout the United States.

Third—That the construction of the Goodwin tank, prior to and at the time of the accident, was such that the sway spout would clear any one riding upon the top of a freight car, who was in the discharge of the ordinary duties of a brakeman. (Record, pp 54, 57, 120, 139, 145, 150 and 167.)

It is true that the plaintiffs in error did introduce the testimony of one R. H. Briggs, who testified that the proper railroad water tank should have attached to it a sway spout which should hang vertically when at rest, but likewise, in the same connection, states that this regular standard, as to which he testified was the standard which the road department of the Kansas City road, with which he was connected, had determined for itself. (Record, pp. 64 and 65.)

The said witness likewise, however, stated on page 70 of the Record, and in his cross-examination, that he was only familiar with his own road; that he had not observed how tanks hung upon other roads, and that he supposed that the variety in the height of cars would compel other roads to conform to the standard set by his road.

Again, on page 71 of the Record, he testifies that on other well-regulated roads in the United States he did not know how the spouts hung; and finally admitted that upon the Kansas City system the sway spouts hung at various angles; and then, over the objection of the defendant below, he was allowed to state that the reason that sway spouts actually hung at various angles upon the Kansas City system was owing to the negligence of the employes of that system. (Record, pp. 71 and 67.)

This was all of the evidence upon this point, and yet the jury found that the principles of the law above mentioned had been violated by the railroad company.

If, however, this honorable court, in reviewing the evidence, should determine that it was a custom upon the Kansas City system to hang its sway spouts vertically, or should hold that the testimony of Briggs upon this point should have been left to the jury to say whether or not this conclusion could have been drawn from it, we submit that the question was not what custom was adopted upon the Kansas City system as affecting the duty of the defendant below, but the question was, What was the general usage upon railroads throughout the United States?

Again, if we admit that the custom upon the Kansas City

system, as testified to by Briggs, definitely required sway spouts to be hung vertically; yet, if it be admitted, as it must be, that upon other well-regulated railroads throughout the United States the custom was to hang the sway spouts just as it was hung upon the Goodwin tank, then the defendant company had the right to determine as between the two methods, and if it adopted a method more hazardous to the servant, yet he could not complain thereof.

In direct support of this contention we cite the case of Logging Company vs. Snyder, supra, where this language is used: "The master may, however, conduct his business in the way that seems to him best, although other ways may be less hazardous."

To the same effect is the case of Railroad vs. Seeley, 152 United States, 145, where this language is used, Justice Shiras delivering the opinion:

"The theory upon which the plaintiff proceeded in the court below was that Seeley lost his life by reason of the negligence of the defendant, a railroad company, in using in its switches what is called an unblocked frog. A frog in railroad parlance is a section of rail or several rails combined at a point where two railroads cross, or at the point of a switch for a line to a siding, or to another line, and its function is to enable a car or train to be turned from one track to another. In a blocked frog the point of space between the rails, at the point where the car is switched from one track to another, is filled with wood or other material, so that the foot will not be held. There is a form of cast iron frog in which the space between the rails at the apex of the frog is filled with cast iron, but the evidence clearly was, that the defendant used the unblocked frog, although at some places the cast iron frog was used. The language of the evidence, as we read it in the bill of exceptions, was that on other great railroad systems of the West the unblocked frog was generally used. There was evidence tending to show that the unblocked frog is the better form. In this disputable state of facts the defendants asked the court to charge the jury as follows:

" 'The jury are instructed that if they find, from the evidence, that the railroad company used both the blocked and the unblocked frog, and it is questionable which is the safest or most suitable for the business of the roads, that the use of the unblocked frog is not negligence, and the jury are instructed not to impute the same as negligence to the

defendant, and they should find for the defendant.' This prayer should have been given by the court."

After quoting many authorities in support there, the court uses this language: "In view of these cases, and many others of similar import, which it is unnecessary to cite, we think it is plain that the defendant was entitled to the instruction prayed for, if the case went to the jury; but that, upon the whole evidence, the prayer for a peremptory instruction in defendant's favor ought to have been granted."

To the same effect, see Randall vs. Railroad, 109 U. S., 418, which was a case where the plaintiff was injured in the course of his employment as a brakeman. It appeared, upon the trial, that he was hurt in unlocking a ground switch. It appeared, from the evidence, that the defendant was negligent; that the defendant did not have an upright switch, instead of a ground switch, as the former was safer. It was shown that the ground switch was in common use; but, at the same time, a brakeman was called by the plaintiff, who stated that, in his opinion, it was not the proper kind of switch; that he thought it was not safe there, and that it could not be unlocked, without danger, when a train was coming upon the other track. This court held: First, that it is the settled law of this country, that when the evidence given at the trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant.

Second, tried by this test, there was no sufficient evidence of any negligence on the part of the railroad in the construction and arrangement of the switch, to warrant a verdict for the plaintiff on that ground. The testimony of the plaintiff and his witnesses was too slight.

From these cases it will be observed that the evidence introduced by the plaintiffs there, which tended to show improper construction, by showing that such construction was not used by other mentioned railroads in the United States, was of a much stronger character than was the evidence of the plaintiffs below, in the case at bar.

It will be observed that in the case of Logging Company vs. Snyder, supra, several witnesses testified that in various other mills the construction of the saw was different and safer, yet the court held that, since they could not say that

the saw used by the defendant there was not in general use, that upon this point the court should have directed a verdict for the defendant, since it introduced many witnesses showing that such a machine was in general use.

So, with regard to Railroad vs. Seeley, supra. In that case the doctrine is specifically announced that if, from the evidence, it be found that railroad companies used both the character of construction established by the defendant, as well as a different character of construction, then the defendant had the right to choose the kind of construction which it would use, and was not liable to the plaintiff for adopting the less safe construction. If this principle be applied in the case at bar, manifestly the court erred in not granting a peremptory instruction; for, if we give the plaintiffs below an unwarranted advantage in the consideration of the evidence of R. H. Briggs, the most that can be contended for is, that many well-regulated roads throughout the United States construct their water tanks and appliances just as did the defendant in the case at bar, but that one company did not so construct its tanks.

To the same effect, see Bailey's Personal Injuries relating to Master and Servant, Vol. I, pp. 22 and 21, where this language is used:

"The master is bound to use appliances which are not defective in construction; but, as between him and his employes, he is not bound to use such as are of the best or most approved description. If they are such as are in general use, that is all that can be required. The employer is bound to furnish machinery and appliances that are of ordinary character and reasonably safe, and the former is the conclusive test of the latter. Whatever is according to the general usage and ordinary course adopted by those in the same business, is reasonably safe, within the meaning of the law. Hence, where there are several methods in general use, the choice being a matter of judgment, depending upon the surrounding conditions, the owner has an absolute discretion to select, according to his own judgment. The necessary control of his business demands that this right should be strictly maintained. The test of liability is not danger, but negligence, and negligence can never be imputed from the employment of such methods as are ordinarily in general use in the business. The master's duty does not require him to provide appliances similar in kind to those that are in use in other establishments, even though they may be less dangerous than those in use by him, but

merely to furnish appliances which are proper and suitable, and this is to be determined by their actual condition, and not by comparing them with appliances in other establishments for similar work. The master's duty was expressed to be the exercise of ordinary care in furnishing such appliances as have been found safe, and are ordinarily used by others in the same business. The employer does not undertake, with the employe, that he will use the very best appliances, nor is he called upon to discard machinery adopted by him in his business, reasonably suited therefor. Still less is the master to be cast in damages for error in judgment in selecting one method of prosecuting his business, or one set of machinery or appliances, on the proof that another method or appliance is better or safer, where both methods, or sets of appliances, are in common use."

To the same effect: Hewitt vs. R. R., 67 Mich., 61; Ship Bldg. Co. vs. Nutsall, 119 Pa. St., 149; R. R. vs. Hays, 128 Pa. St., 294; Henry vs. R. R., 81 N. Y., 373; Muerhead vs. R. R., 103 Mo., 251; Goodknow vs. Emery Mills, 146 Mon., 261; R. R. vs. Blake, 63 Fed. Rep., 45; R. R. vs. McDade, 135 U. S., 554; Kehler vs. Schwen, 144 Pa. St., 348; Reese vs. Hircia, Pa. St., 253; Wood vs. Heiges, 34 At. Rep., 872; R. R. vs. Warner, 36 S. W., 118; Sisco vs. R. R., 145 N. Y., 296.

Several of the cases above mentioned were decided upon facts very similar to the facts of the case at bar.

As directly in point and upon similar facts, we cite the following cases: Clarke vs. R. R., 78 Va., 711; Baylor vs. R. R., 40 N. J. L., 23; R. R. vs. Shicker, 51 Md., 47; Hughs vs. R. R., 91 Ky., 526; Sheelers, Admr., vs. R. R., 81 Va., 188; Illick vs. R. R., 67 Mich., 623; Lee vs. R. R., 86 Ga., 23; Sisco vs. R. R., 145 N. Y., 296; Allen vs. R. R., 64 Iowa, 94; McKee vs. R. R., 13 L. R. A., 820; Perigo vs. R. R., 52 Iowa, 276; Wells vs. R. R., 56 Iowa, 524; 113 Pa. St., 490; 17 At. Rep., 491.

ASSUMED RISK.

Again, if we are mistaken upon the proposition just discussed, we contend that the burden of proof was upon the plaintiffs, to show that the dangers incident to the construction and maintenance of the sway spouts were not risks assumed by the deceased, and that the evidence in this case was wholly insufficient to sustain plaintiffs' case upon this point, for we contend that, irrespective of the burden of proof, and, had the burden upon this point been placed

upon the defendant below, still the evidence is insufficient to sustain this necessary proposition. It is an undoubted rule of law, as stated in the case of Reed vs. Stockmyer, that "the master may, however, conduct his business in the way that seems to him best, although other ways may be less hazardous; in which case, if the servant knows the danger attendant upon such manner of prosecuting the work, he assumes the risk of the more hazardous method. The servant, on his part, assumes the natural and ordinary risks attendant upon his employment; he does not, however, assume unusual and extraordinary risks, of which the master knew, or should have known, or foreseen, *unless such risks are obvious*, or the servant has actual or presumed knowledge of the danger. It is the duty of the servant to use ordinary care to ascertain the dangers attendant upon the service in which he engages, and to protect himself against known dangers, and such as can by ordinary care be ascertained. This duty is as imperative upon him as is the duty laid upon the master."

Again, the case of Logging Company vs. Snyder, 20 C. C. A., 393, uses this language: "The servant of mature age and experience is charged by the law with knowledge of obvious dangers, and of those things which are within common observation and are according to natural law. In such case, the master need not give warning as to possible danger of which both parties had equal knowledge."

If it be admitted, therefore, that the defendant company had failed to provide the servant with such a place to work in, as is customarily given servants of like character on the well-regulated railroads throughout the United States, we earnestly contend that since the use of the water tank at Goodwin Station, with its appurtenances, its construction, and maintenance, and the dangers incident thereto, were perfectly obvious to an experienced railroad employe, such as McDade is admitted to have been; that McDade assumed the risk of being struck by the tank as he passed under it, riding upon the tops of freight cars, and, therefore, the court erred in refusing to grant the defendants a peremptory instruction.

The evidence clearly shows, as set forth in the statement of the case, that John I. McDade was an experienced railroad brakeman, that he had been employed in the railroad business for some twelve or fifteen years prior to his death, and had occupied positions both of brakeman and

conductor, and had served on several different railroads in these capacities. (Record pp. 15 and 17.)

That since the 24th of June, 1900, a period of over two months before the date of his injury, McDade regularly ran upon the freight trains of the C., O. & G. R. R. Co., daily performing the duties of head brakeman; that he had been performing these duties upon that division of the defendant railroad company upon which is situated the Goodwin tank, for about six weeks prior to his death, and since the 24th of June he had always been engaged upon those parts of the defendant railroad company upon which was situated tanks of like character as the one at Goodwin Station. (Record, pp. 15, 38, 82, 114 to 117.)

If it be admitted that McDade was seated upon the Illinois Central furniture car at the time of the accident, it is also clearly shown that the said furniture car had been delivered to the defendant railroad in the usual interchange of business, and that such cars had been frequently handled by the defendant company some time prior to the date of the employment by it of McDade, and that these cars were frequently handled by the said railroad during the time that McDade worked upon that portion of the road which passed Goodwin Station. (Record, pp. 57, 58, 111 and 114 to 117.)

It is likewise admitted from the time that McDade was employed by the defendant company, there had been no change in the maintenance and construction of the water tank and the sway spout attached thereto, both with regard to their physical condition and with regard to the angle at which the sway spout was hung.

It is likewise proven that it was the duty of one occupying McDade's position to have kept a careful lookout for all structures situated near to or projecting toward the track. (Record, pp. 45, 46 and 54.)

It is also uncontradicted that McDade was frequently attached to trains of the defendant company, in which were situated furniture cars of like measurements as Illinois Central car No. 28,149, and while working as brakeman on said trains, had passed the Goodwin tank many times prior to the date of the accident, both in the day time and in the night. (Record, pp. 111 and 114 to 117.)

It is likewise agreed that the night of the accident was clear, and that the electric headlight of the engine threw a light upon the water tank, fully disclosing it and its appurtenances, including the sway spout, to any one on the

cars situated as McDade was situated, for nearly a mile before the train reached the tank. (Record, pp. 151 and 154.)

It is likewise clearly shown that McDade had finished giving the signal for Goodwin tank, before the train reached the tank, as this signal was given at a distance of one-half mile west of the tank, and merely consisted in the simple raising of a lighted lantern. (Record, pp. 40, 41, 82, 83 and 84.)

It is uncontradicted that the position of a brakeman on top of the cars is left to his individual judgment, so that there was no necessity for McDade to have been in a sitting position as the train passed Goodwin tank, but that he could have chosen any position that suited his pleasure, since he had no further duties to perform after giving the signal, which would have required him to have assumed any particular position, and there was no apparent necessity for the said McDade to descend the ladder upon the side of the car.

We submit that, bearing in mind the principles of law announced in the above quoted cases, that there can be found no stronger case than this for the correct application of the rule of assumed risk upon the part of the servant. Here the deceased was a man of experience in the railroad business; he passed and repassed the Goodwin tank daily for a period of nearly two months before he was injured; it was his duty to look out for projections towards the track; he knew that he was passing Goodwin tank, for shortly before the accident occurred he had signaled the engineer to proceed through Goodwin without stoppage. The night was clear, and McDade was looking toward the engineer, who was seated in the engine cab east of the position that McDade occupied; so, therefore, McDade must have been looking directly toward the Goodwin tank, which was situated directly in his front, and just a few feet from the outside of the track. Besides this, the electric headlight fully disclosed the tank and sway spout for nearly a mile. This being the condition of things, all that was necessary for McDade to do was merely to survey the highway ahead of him, and simply keep his eyes open, and he must have seen the tank and sway spout. Had he perceived the sway spout, and exercised the slightest degree of care, he could have escaped the dangers incident thereto by merely stooping his body a few inches either toward the north, or by leaning his body

back a few inches toward the south, or, for that matter, by turning sideways, stooping either to the east or west, or by sitting a little further back on the car.

Again, it was not necessary for McDade to seat himself upon the side of the car in order to give the signal, which was given as the train approached Goodwin, but he could have stood upright and thus escaped the danger of being struck, since it is admitted that the particular position in giving the signal was left to his discretion, his duty only requiring him to occupy such a position as would enable the engineer to see the signal, and as would enable him to avoid obvious dangers that might affect himself. It may be argued that it was merely temporary forgetfulness upon the part of McDade that prevented him from realizing the danger and avoiding it, but as is well said in Beech on Contributory Negligence, Section 37: "Where one knowing the danger temporarily forgets it, and in consequence suffers, his forgetfulness will not avail him as an excuse, but if he knows he must remember at his peril, and not to remember is contributory negligence, if it occasions the injury, as where a person familiar with a dangerous railroad crossing, in a fit of absent-mindedness, omitted to ascertain whether a train was coming, and consequently was injured." Quoting Railroad vs. Whitacre, 35 Ohio State, 627; Burker vs. Covington, 69 Ind., p. 33; Bassett vs. Fisk, 75 N. Y., 303; Reid vs. Balston, 76 N. Y., 329.

It may also be argued that the danger was not an obvious one, but what could be more obvious than the angle at which this sway spout was hung, since it projected toward the track, over which the deceased rode daily?

Again, it may be argued that, in passing, a man of ordinary care would not pay particular attention to the exact distance that the sway spout cleared the tops of the freight cars. While this might be true, with regard to a passenger, or with regard to one whose duties did not require him to be so frequently upon the tops of cars, yet where one is required to ride daily, sitting, and standing, upon the tops of freight cars of different heights, certainly the exercise of the slightest degree of care would cause such a one to ascertain such a distance, and the danger, if any, incident to this projection.

It may be argued, also, that upon the night in question, the deceased was riding upon a car higher than the ordinary box car; but it will be remembered that this car was taken in the usual interchange of business, and that the

defendant was not negligent in receiving such car to be carried over its road. It will also be remembered that such cars were frequently handled by the defendant company during the period that McDade was occupying the position of head brakeman, and in trains which passed the Goodwin tank frequently, both during the day and during the night. To say, then, that McDade did not know not only the condition of the sway spout, but also that he did not realize the dangers incident thereto, is to say that McDade was not a man of ordinary intelligence, while the proof is just to the contrary. It is not required of the defendant to show that McDade had actual knowledge either of the condition of the tank or of the dangers incident thereto, for, as above quoted, it is the duty of the servant to use ordinary care to ascertain the dangers attending the service in which he engages, and to protect himself against known dangers, and such as can by ordinary care be ascertained. This duty is as imperative upon him as is the duty laid upon the master. If the servant be of mature years and of ordinary intelligence and experience he is presumed to know and comprehend obvious dangers. In such a case "the master is not liable for injury happening to the servant in the performance of dangerous work without the scope of his service, merely because he had been directed by the master to perform such work. If the servant is possessed of knowledge and experience sufficient to comprehend the danger, and without objection undertakes the service, the master is not liable for injury received by the servant in such new and more dangerous employment."

Reid vs. Stockmyer, 20 C. C. A., 243. Now, if the rule be that where the servant is of ordinary intelligence and experience that the master is not liable for injuries even without the scope of the employment when the dangers are obvious, certainly the servant is presumed to comprehend obvious dangers within the scope of his employment.

The case at bar likewise calls for the application of the rule laid down in Bailey, Vol. II., Section 775, sometimes called "The Equal Knowledge Rule." In actions for injuries resulting to a servant from defective machinery or appliances, the real question is, Whether the servant has had equal opportunities with his employer for observing the defective machinery, or materials, and intends to waive any objection to them." Section 776: "An employe, knowing when he solicits and accepts employment which is giv-

en him, that he must use defective tools, contracts to take them as one of the risks of the service, whether anything is said of the dangerous character of the employment, or of the defective and dangerous appliances or not. If the danger and defects are equally known and open to the observation of both the employer and employe, it can well and justly be said that they stand on a common footing. Acceptance of an employment is an acceptance of the attendant risk, even though the employment be rendered especially hazardous by the use of defective appliances."

Section 777: "Where the employer and employe are equally competent to judge of the risks and hazards, and both have equal knowledge of the surroundings, the employer cannot be culpably negilgent as toward the employe, although the work may be dangerous and hazardous, and although it might be made safer by the employer if he chooses to do so." (See also illustrations cited at great length in this authority, pp. 263 to 270.)

Again, this case calls for the application of the rule that it is the servant's duty to inform himself as to defects and dangers. Bailey, Section 796: "The master has a right to expect, and such is a servant's duty, that he will use reasonable care in examining his footings and surroundings; he has a right to rely upon the probability that any one would know what was generally to be seen by his own observation. An employe must take ordinary care to observe and ascertain whether any, and what dangers, are incident to service, and must be held to the ascertainment and knowledge of such dangers as ordinary care would have disclosed.

"While an employe has the right to presume that his employer has discharged his duty, yet this rule cannot exempt him from the duty of exercising reasonable care; he cannot exempt himself from the duty of making a prudent and reasonable use of his faculties, or of heeding facts open and visible to ordinary observation."

For illustrations of this rule, see Bailey, pp. 273 to 283.

Upon prinicple, we submit that a rule holding that the deceased had assumed the risk is eminently correct, for he had just as full and ample opportunity for observing the conditions surrounding the Goodwin tank and its appurtenances and the dangers thereto, as did the railroad company. If it be contended that others had passed under the Goodwin tank in safety, and that McDade had no rea-

son to be careful at this point, then we submit the railroad company did not fail to use ordinary care in so constructing the tank. Of course, the defendant company did not know the exact position that brakemen would assume in passing this tank, and so the brakemen were in a better position by actually passing the tank to understand and appreciate its dangers to them than was the railroad company.

If it be contended that Hollowell and other employes were obliged to be careful in passing this tank, then certainly McDade should have been careful; if it be contended that McDade had no reason to consider the sway spout a dangerous projection, then the defendant company had no reason to so consider it. This exact case has never been passed upon in the United States courts; however, a question very similar was decided in the case of Myers against the railroad company, 37 C. C. A., 137, wherein it is held that where the deceased had been over the road for fifty days preceding the accident without objection, that he must be held to have assumed the risk of the dangers incident to the construction of a bridge too low for him to pass under while riding on the top of a freight car. This case distinguishes the case of Railroad vs. Mortenson, 11 C. C. A., p. 135, wherein it was held that the question of the assumption of risk from an overhead bridge was a question for the jury, and likewise that the question of negligence on the part of the company in maintaining a bridge having overhead tie beams too low to admit of a safe passage of a brakeman standing on the running board of a furniture car was also a question for the jury, but in this latter case, as the brakeman passed the bridge, his duties required him to be in the position of standing upright, which position was occupied when he was struck.

It was also claimed by the brakeman in the Mortenson case, that he had no notice of the fact that the bridge was too low to admit the safe passage of a brakeman standing on the top of a furniture car. There have been, however, several decisions both in the United States Supreme Court and in the Circuit Court of Appeals, which, upon principle, settled this question in defendant's favor.

Thus in Hunt vs. Hurd, 39 C. C. A., 226, it was held that the making of a flying switch by a railroad company in its yards in the day time, and in the usual manner, is not neg-

ligence, *per se*, as to an employe working in the yard, but that the said employe assumed the risks of the same.

In the case of Logging Co. vs. Snyder, 20 C. C. A., p. 390, it was held that the dangers incident to the absence of safeguards upon a jump saw were risks assumed by the employe.

In Reid vs. Stockmyer, 20 C. C. A., 381, that the negligent, though usual use of wedges in a stone quarry, in which the servant was employed, was assumed by him.

In the case of Southern Pacific Co. vs. Seeley, 152, U. S., p. 145, it was held: "In an action to recover from a railroad company damages for the death of an employe by catching his feet in an unblocked frog while uncoupling cars, and while in that condition being run over by the car; where the evidence shows that he had been in the employ of the defendant for several years as brakeman, and as conductor of freight trains, that his duty brought him frequently into the yard in question, and the necessary view of the frog therein used, it must be assumed that the deceased had full knowledge of dangers arising out of the unblocked frogs, and cannot recover.

The court quotes, with approval, the case of Sheets vs. Car Co., 756 Mich., 132, as follows:

Cooley, J.: "From this state of facts it will appear that if the defendant has been guilty of negligence which contributed to cause the injury, it is to be found in the fact that a machine is made use of which is not so constructed as to guard as well as it might against simple accidents. Such danger as would result from making use of it was perfectly apparent, and would seem to be easily avoided."

The court also quotes, with approval: Wash vs. Whitler, 21 Q. B., 271; Sweeney vs. Envelope Co., 101 N. Y., 520; Hoskins vs. the Railroad, 119 Mass., 419.

In Kohn vs. McNulta, 147 U. S., 248, it was held—1. That a railroad company is guilty of no negligence in receiving in its yards and passing over its lines, freight or passenger cars the couplings of which are different from those it owns and uses.

2 A watchman who has been engaged in coupling cars in a railroad company's yards for over two months, before the accident, and is familiar with the tracks and yards, and experienced in the business, cannot recover of the company by whom he was employed, for an injury to an arm

by its being crushed between the cars, although the cars were those of another company, and the couplings thereon were different from those used by the employer.

3. Where an employe is not placed by the employer in a position of undisclosed danger, but is a matured man doing the ordinary work which he had engaged to do, and risks of which work were obvious to any one, he assumes the risk of the employment, and no negligence can be imputed to the employer for the accident to him therefrom.

Tuttle vs. the Railroad Co., 122 U. S., 114, holds that the servant assumes the risk of imperfect and faulty construction of curves in the tracks of the railroad company within its yards.

Randle vs. the Railroad Co., 109 U. S., holds that a brakeman assumes the risk of the dangers incident to the use of the ground switch. To the same effect see McDade vs. the Railroad, 135 U. S., 554.

We submit upon principle that if the servant is held to have assumed the risk of dangers incident to the use of couplings, switches, the absence of safeguards from machinery, and also from unblocked frogs, there is no reason why the deceased in the case at bar should not be held to have assumed the risks of the dangers incident to the hanging of the sway spout.

Again, there is no proof that this was an unnecessary exposure of the servant to danger, since it was clearly shown that the reason why the sway spout was not hung vertically was because, if it was hung vertically it would have been inconvenient, if not impossible, for the employes to have used it, and hence its construction was not necessary. As has been well said, there are certain employments that are necessarily dangerous, and that cannot be made safe. The great weight of authority is in favor of our contention on this point. Elliott on Railroads, Vol. III., Sec. 1269, uses this language: "Many courts hold that structures erected or suffered to remain so near the track as to endanger the safety of employes while engaged in the performance of the duties required of them by their contract of service, constitute a breach of the employer's duty to exercise ordinary care to put and keep the working place in a reasonably safe condition for use. Other courts, however, hold that the risk from structures near the track is one of the risks of the service which the employe assumes. It seems to us that where the employe has knowledge, or is chargeable with knowledge of the existence and

situation of such structures, he assumes the risks of dangers from them, for we can see no reason why the general rule that an employe assumes the risk of the dangers of the service does not apply, but if the employe does not know of the danger he is not chargeable with knowledge of it, and if it is caused by the employer's negligence, the employer is liable.

"The distinction is made between cases where the obstruction is a temporary one, and cases where the structure is of a permanent nature. We think there is just ground for such a distinction, but that if the employe knows of the obstruction, and does not use necessary care to avoid injury from it, he cannot recover.

"Some of the courts seem to require proof of actual knowledge in order to exculpate the employer, but we think this view erroneous, for if the facts are such as make it negligence on the employe not to know, there can be no recovery."

The courts which adopt the view that the servant assumes the risks incident to overhead and projecting structures, many of which go even beyond the rule announced, as in Elliott, above, are the courts of Alabama, Kentucky, Kansas, Minnesota, Vermont, Indiana, Georgia, South Carolina, New Jersey, New York, Maryland, Missouri, Pennsylvania, Virginia, Massachusetts, Wisconsin, Michigan, Texas and Iowa.

These cases proceeded upon the theory that there should be no exception of overhead and projecting structures from the general rule, that the risks of obvious dangers are assumed, and hold that nothing could be more obvious than the dangers incident to such structures. It will not be our purpose to quote at length from each of these cases which are cited below, but simply to call the court's attention to those cases wherein the facts are similar to the facts of the case at bar.

See Fisk vs. Railroad, 158 Mass., 238; Lovejoy vs. the Railroad, 125 Mass., 79; Thain vs. Railroad, 161 Mass., 353; Skidmore vs. the Railroad, 89 Wis., 188; Ciscoe vs. Railroad, 145 N. Y., 296; Seemore vs. Maddox, 16 J. B., 26; Lyon vs. Railroad, 10 Ont., 745; Jennings vs. Railroad, 7 Wash., 275; McKee vs. Railroad, 83 Iowa, 616; Clark vs. the Railroad, 28 Minn., 128; Raney vs. the Railroad, 71 Miss., 164; Railroad vs. Henderson, 142 Ind., 590; Railroad vs. Finnie, 42, W. E. 816; Jolley vs. Railroad, 93 Mich., 370; Railroad vs. Summers, 71 Tex., 700; Platt vs.

Railroad, 84 Iowa, 694; Bailor vs. Railroad, 40 N. J. Law, 723; Clark vs. Railroad, 78 Va., 709; Railroad vs. Strickler, 57 Md., page 47; Hughes vs. Railroad, 91 Ky., 520; 81 Va., 188; Illick vs. Railroad, 67 Mich., 632; Lee vs. Railroad, 86 Ga., 231; Allen vs. Railroad, 64 Iowa, page 94; 88 Ga., page 210; 52 Iowa, 276.

Third— We submit that in the case at bar the evidence clearly showed that the deceased was guilty of contributory negligence, as well as that he assumed the risk of the dangers incident to the construction of the sway spout. In deciding cases of this character, courts have frequently forgotten or confused the rule of assumed risks and that of contributory negligence. That there is a distinction is plain, for the first question on the part of the defense usually is whether or not the risk was one assumed by the servant. In the discussion of this question it is immaterial whether the servant acted with due care or not, for having accepted the risk as incident to his employment, he cannot complain if it be such as cannot ordinarily be performed even by the exercise of due care. If, however, the risk is not assumed, then the inquiry arises as to whether the risk was in exercise of due care.

Contributory negligence has been defined by the Supreme Court of the United States in Railroad vs. Jones, 95 U. S., 439, as follows:

"Where the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution, that but for such negligence or want of care and caution on his part the misfortune would not have happened, he cannot recover."

Many of the authorities cited above by us hold that the servant cannot recover where he has been struck by overhead or projecting structures on the ground that he failed to use ordinary care to protect himself, while other courts hold that he cannot recover on the ground of assumed risk.

We submit that in the case at bar, if either the one theory or the other be adopted, there can be no recovery. Truly, in this case it is hard to conceive how the deceased could have exercised as little care as the Record shows that he did. The mere turning of the head would have clearly discovered to him the presence of the Goodwin tank, and have revealed to him its obvious dangers; then all that he need have done was to have slightly changed his position and he would have been perfectly safe.

II.

The court erred in admitting, over the objection of the defendant, the following evidence, which appears in the direct examination of Mrs. Bettie C. McDade, a witness for the plaintiff, to-wit:

"Q. Mrs. McDade, what was your husband earning at that time?

"A. Seventy dollars a month.

"Mr. Wright: That is objected to, unless she knows of her own knowledge."

Said objection was overruled by the court, to which ruling the defendant duly excepted.

"A. Well they sent me a check——

"Q. Who did?

"A. The Choctaw, Oklahoma & Gulf Railroad Company, after he was dead. I have that at home. It says: 'This is for twelve days' work,' and that was for $37.75.

"Q. They sent you a check for $37.75, which they said was for twelve days' work?

"A. Yes, sir.

"Mr. Wright: That is objected to on the ground that it does not show his earning capacity, but merely what he earned for twelve days."

Said objection was overruled by the court, and the defendant excepted. (Record, p. 15.)

There are three reasons why the above mentioned evidence is incompetent:

First—The testimony upon the part of Mrs. McDade, stating what her husband was earning at the time of his death, was purely hearsay, and in no wise comes up to the standard of competent evidence. She does not state that she learned from the railroad company that her husband was earning $70 per month, but states, in effect, that the only reason why she makes this statement is because, after his death, she received a check for $37.75, which the railroad company said was for twelve days' work.

Second—The evidence is incompetent for the reason that the mere fact that the railroad company sent to Mrs. McDade $37.75 for twelve days' work of the deceased, does not in any wise tend to show the earning capacity of the deceased, which was the sole issue upon which such character of evidence would have been competent, but merely shows that for twelve days prior to his death he performed such an amount of work as would entitle him to the sum

Railroad, 84 Iowa, 694; Bailor vs. Railroad, 40 N. J. Law, 723; Clark vs. Railroad, 78 Va., 709; Railroad vs. Strickler, 57 Md., page 47; Hughes vs. Railroad, 91 Ky., 520; 81 Va., 188; Illick vs. Railroad, 67 Mich., 632; Lee vs. Railroad, 86 Ga., 231; Allen vs. Railroad, 64 Iowa, page 94; 88 Ga., page 210; 52 Iowa, 276.

Third— We submit that in the case at bar the evidence clearly showed that the deceased was guilty of contributory negligence, as well as that he assumed the risk of the dangers incident to the construction of the sway spout. In deciding cases of this character, courts have frequently forgotten or confused the rule of assumed risks and that of contributory negligence. That there is a distinction is plain, for the first question on the part of the defense usually is whether or not the risk was one assumed by the servant. In the discussion of this question it is immaterial whether the servant acted with due care or not, for having accepted the risk as incident to his employment, he cannot complain if it be such as cannot ordinarily be performed even by the exercise of due care. If, however, the risk is not assumed, then the inquiry arises as to whether the risk was in exercise of due care.

Contributory negligence has been defined by the Supreme Court of the United States in Railroad vs. Jones, 95 U. S., 439, as follows:

"Where the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution, that but for such negligence or want of care and caution on his part the misfortune would not have happened, he cannot recover."

Many of the authorities cited above by us hold that the servant cannot recover where he has been struck by overhead or projecting structures on the ground that he failed to use ordinary care to protect himself, while other courts hold that he cannot recover on the ground of assumed risk.

We submit that in the case at bar, if either the one theory or the other be adopted, there can be no recovery. Truly, in this case it is hard to conceive how the deceased could have exercised as little care as the Record shows that he did. The mere turning of the head would have clearly discovered to him the presence of the Goodwin tank, and have revealed to him its obvious dangers; then all that he need have done was to have slightly changed his position and he would have been perfectly safe.

II.

The court erred in admitting, over the objection of the defendant, the following evidence, which appears in the direct examination of Mrs. Bettie C. McDade, a witness for the plaintiff, to-wit:

"Q. Mrs. McDade, what was your husband earning at that time?

"A. Seventy dollars a month.

"Mr. Wright: That is objected to, unless she knows of her own knowledge."

Said objection was overruled by the court, to which ruling the defendant duly excepted.

"A. Well they sent me a check——

"Q. Who did?

"A. The Choctaw, Oklahoma & Gulf Railroad Company, after he was dead. I have that at home. It says: 'This is for twelve days' work,' and that was for $37.75.

"Q. They sent you a check for $37.75, which they said was for twelve days' work?

"A. Yes, sir.

"Mr. Wright: That is objected to on the ground that it does not show his earning capacity, but merely what he earned for twelve days."

Said objection was overruled by the court, and the defendant excepted. (Record, p. 15.)

There are three reasons why the above mentioned evidence is incompetent:

First—The testimony upon the part of Mrs. McDade, stating what her husband was earning at the time of his death, was purely hearsay, and in no wise comes up to the standard of competent evidence. She does not state that she learned from the railroad company that her husband was earning $70 per month, but states, in effect, that the only reason why she makes this statement is because, after his death, she received a check for $37.75, which the railroad company said was for twelve days' work.

Second—The evidence is incompetent for the reason that the mere fact that the railroad company sent to Mrs. McDade $37.75 for twelve days' work of the deceased, does not in any wise tend to show the earning capacity of the deceased, which was the sole issue upon which such character of evidence would have been competent, but merely shows that for twelve days prior to his death he performed such an amount of work as would entitle him to the sum

of $37.75. The Record is silent as to the terms of McDade's employment, whether he worked by the day, week or month, at a regular salary, or whether he received pay according to the actual time he put in. The Record is also silent as to whether, during the twelve days prior to his death, he had performed any extra work. Consequently, all that such evidence could prove was that this was the amount of his earnings during these twelve days, and did not in any wise tend to show what was his earning capacity.

Now, the question is not what McDade earned at any particular time, but what was his earning capacity, and to allow proof that McDade earned a certain amount for twelve days before his death to show what was his earning capacity, was certainly incompetent.

Third—If we are mistaken with regard to the soundness of the foregoing grounds of incompetency, we submit that all of this evidence was incompetent on the ground that it is not competent to show what the deceased was earning merely at the time of his death, as this does not show earning capacity; for earning capacity depends upon various elements, none of which were shown by this evidence. Such elements, among others, are the supply and demand for such work as the plaintiff performed, the state of health, habits, etc., all of which enter into and make up his earning capacity.

That we are correct upon this point we cite Railroad Company vs. Howard, 6 Pickle (Tenn.), page 150, where the court used this language: "It is assigned as error that the court admitted proof of the value of crops made by the deceased, for some years before he was killed, in estimating damages sustained by defendant in error. The witness, Atkins, testified that he had known the deceased several years, and that he was a farmer, and that after proving his character and habits, he was asked by the defendant in error this question: 'During the time you were acquainted with him and his farming operations, what would be the minimum value per annum of his crops?' The witness answered: 'I suppose about $250.'

"This question and answer was admitted over the objection of the attorney for the plaintiff in error. This was error for which a new trial must be granted. It was competent to show the ability and capacity for labor of the deceased, as well as his skill, in any particular art or profession in order to show what he was capable of earning, but

not to show what was the minimum value of his crops for the past year, or years. This was mere speculation."

III.

The court erred in admitting, over the objection of the defendant, the following evidence found in the direct and re-examination of C. A. Hollowell, a witness for the plaintiff, to-wit:

First—"Q. Where was he standing, to the best of your knowledge, at the time he was giving this signal as the train was pulling into Goodwin?

"A. From the position of his lamp and the signal, I should judge he was *probably* sitting on the edge of the car.

"Q. He was sitting at the time you gave this signal?

"A. I should judge this was his position at this time.". (Record, p. 41.)

Counsel for defendant objected to this evidence, which objection was overruled, and the defendant excepted.

Second—"Q. How long had the tank been in the condition that it was on the night that this train passed by?

"A. As far as I know ever since I have passed there.

"Q. State whether or not you had ever made any observation in regard to it personally.

"A. Nothing, only to be careful to be out of the way of it.

"Q. You had to be careful to keep out of the way of it, did you?

"A. Yes, sir." (Record, pp. 44 and 45.)

These questions and answers were objected to by the defendant; the objection was overruled, and the defendant excepted.

Third—"Q. State what is the usual custom of a head brakeman on your road and others in regard to their position on the top of the car when passing stations.

"A. Well, there is no special position at all. They use their own pleasure in regard to that.

"Q. What custom, if any, exists in regard to their sitting on the side of the car?

"A. That is the customary position always of a person riding on top.

"Q. Then, at the time that this train pulled into Goodwin, Ark., on the night of August 19, Mr. John I. McDade was in the customary position while giving the signal to the engineer not to stop at Goodwin, and in the discharge of his duties, was he not?

"A. Well, I will answer that he was in the discharge of his duties.

"Q. He was, at the last time you saw him, in the proper discharge of his duties?

"A. Yes, on top of the train, looking after the train." (Record, pp. 46 and 47.)

These questions and answers were objected to by counsel for defendant, and the objection being overruled, the defendant excepted.

Fourth—"Q. State what his character was with reference to his efficiency, carelessness or prudence.

"A. He was always very careful in handling trains, doing work and anything of that kind." (Record, p. 49.)

To this question and answer defendant objected, which objection was overruled, and defendant excepted.

Fifth—"Q. Mr. Hollowell, please state whether or not you know of any reason in the world why the head brakeman, Mr. McDade, should have been on the side of the ladder, either ascending or descending, as the train was pulling through Goodwin?

"A. I don't know of any reason that would necessitate his being on the ladder at all at that time." (Record p. 55.)

To this question and answer defendant objected, which objection was overruled, and defendant excepted.

Sixth—"Q. State whether or not, if he desired to get in such a position—that is, to descend on the ladder for the purpose of looking at anything or making any investigation—what is customary with reference to carrying his lantern?

"A. He would not have left his lantern there if he had went down the ladder. He would have taken his lantern with him.

"Q. His lantern was, as you have stated, in a position?

"A. That he would naturally place it in after he had given the signal.

"Q. And in the position a brakeman would naturally place it after sitting down on the north or right-hand side of the grab iron?

"A. It would be, evidently, when he had leaned out to pass the signal to the engineer that he would hold the grab iron with his left hand, with his lantern in the right, after being in that position, passing it to the side of the car, making it more convenient for the engineer to see him,

he would pass around the lantern to where his left hand was." (Record, pp. 55, 56.)

These questions and answers were objected to, and which objection being overruled, defendant excepted.

We will consider each of these objections to the evidence in its numerical order, first setting forth the legal grounds for each objection, and at the conclusion thereof citing the authorities in its support.

First—The court erred in admitting the following questions and answers:

"Q. Where was he standing, to the best of your knowledge, at the time he was giving this signal as the train pulled into Goodwin?

"A. From the position of his lamp and signal I should judge he was probably sitting on the edge of the car.

"Q. He was sitting at the time you gave this signal?

"A. I should judge that this was his position at this time." (Record, p. 41.)

Counsel for defendant objected to this evidence, which objection was overruled, and the defendant excepted.

This was error, as by such admission of evidence, the witness was allowed to draw a conclusion of fact from other facts, which conclusion the jury was just as capable of logically drawing as was the witness. It will be noted that when the direct question was asked the witness: "Where was McDade standing?" he did not answer this question directly, basing his answer upon his personal observation of McDade, but from the position where his lamp was found and the signal was given.

Again, it will be noted in this same connection, and directly following the questions and answers objected to herein, the witness shows by the questions and his answers that he was simply giving an opinion concerning the position of McDade, which was a speculation upon his part; for, upon page 36, continuing, the witness says:

"Q. He was sitting at the time you gave the signal?

"A. I should judge this was his position at this time.

"Q. You saw the signal given, and you could tell whether he was sitting down or standing up?

"A. Yes, sitting down, or standing on the ladder on the side.

"Q. Didn't you say he was sitting down?

"A. I say he must have been."

Second—The court erred in admitting, over the objection of the defendant, the following questions and answers:

"Q. How long had the tank been in the condition that it was in the night that this train passed by?

"A. So far as I know, ever since I have passed there.

"Q. State whether or not you had ever made any observation of it personally.

"A. Nothing, only to be careful to be out of the way of it.

"Q. You had to be careful to keep out of the way of it, did you?

"A. Yes, sir." (Record, pp. 44 and 45.)

These questions and answers were objected to by the defendant; the objection was overruled and the defendant excepted.

The admission of this testimony was error, for the reason that it allowed the witness to state his own experience with regard to the water tank; not only this, but that this experience required him, the witness, to pursue a certain course of conduct with regard to his passage by said tank, when riding on freight cars, viz., that he, the witness, was obliged to be careful to keep out of the way of the water spout attached to said tank. Now, the witness was nowhere asked what position he occupied upon the cars which required him to be careful in passing said tank, nor was it in any wise shown that he occupied a similar position to the one that McDade occupied, or was supposed to have occupied, when the accident occurred. The witness was not a brakeman, but a conductor, and his position upon the cars is not shown to be the same as that of a brakeman in the ordinary discharge of his duties. Neither was the witness asked to detail his course of conduct in passing said tank, nor was he required to show what he meant by the statement that he was obliged to be careful. Whether or not a person exercises care in pursuing a certain course of conduct is generally a mixed question of law and fact to be determined ordinarily by the jury under proper instructions, and thus the ultimate question as a rule depends upon the opinion that a jury may have concerning a specified course of conduct. This opinion, however, or conclusion, of the jury must be drawn from specific facts detailed to them.

Therefore, this evidence was inadmissible, because it took away from the jury the ultimate fact as to what care was required to be used by one passing under the tank, and it allowed the witness to decide this question. Not only this, however, but the witness is not required to state what

he did in passing the tank, so that the jury might determine whether or not he really exercised care. However, the main objection to this evidence, and the one which is conclusive, is that it is not pertinent to the issue, and in no wise tends to throw light upon the main issue in this case. The question is not what care the witness Hollowell was obliged to use in passing the water spout, or whether he was obliged to exercise any degree of care; but the question is, Whether or not the defendant company had allowed its water spout to remain at such an angle as would unnecessarily endanger an employe situated as McDade was situated upon the night of the accident. That this error was harmful, can be seen at a glance, for it will be remembered that no one saw the accident, and that the plaintiff's case was made up entirely of circumstantial evidence, so that each fact bearing upon the issue was a link in the chain, which represented the issue of negligence upon the part of the defendant; and, if any link was missing, necessarily the plaintiff's case failed. Consequently, if said chain of evidence was made up of any link which should not have constituted part thereof, the case of the plaintiffs would necessarily have been weakened, if not entirely destroyed. We insist, therefore, that this evidence was prejudicial to the defendant, as it allowed testimony to go to the jury which had the stamp of expert evidence upon it, and which came from the lips of a fellow employe of the deceased, who was thoroughly familiar with railroad business, and the jury might well have been misled into the belief that since Hollowell, the conductor, was obliged to be careful to keep out of the way of the spout, that it was a dangerous contrivance; and, in short, the jury were allowed to take the opinion of Hollowell upon this point, rather than required to form their own opinion from specific facts narrated. And what has been said here concerning the hurtfulness of this error will apply to each of the other assignments concerning the admission of evidence.

This exact question is decided in R. R. vs. Ellison, 117 Ind., 234.

The other authorities in support of this assignment will be cited at the conclusion of the fourth sub-assignment under this general assignment of No. III., since sub-assignment 2 and 4 are analogous and the authorities bearing upon them are the same.

Third—"Q. State what is the usual custom of head brakemen on your road and others in regard to their position on the top of the car when passing stations.

"A. Well, there is no special position at all. They use their own pleasure in regard to that.

"Q. What custom, if any, exists in regard to their sitting on the side of the car?

"A. That is the customary position always of a person riding on top.

"Q. Then, at the time that this train pulled into Goodwin, Ark., on the night of August 19, John I. McDade was in the customary position while giving the signal to the engineer not to stop at Goodwin, and in the discharge of his duties, was he not?

"A. Well, I will answer that he was in the discharge of his duties.

"Q. He was, at the last time you saw him, in the proper discharge of his duties?

"A. Yes, on top of the train, looking after the train."

These questions and answers were objected to by counsel for defendant, and the objection being overruled, the defendant excepted. (Record, pp. 46 and 47.)

The question here raised is, Whether an experienced railroad man will be allowed to state, as an expert, whether or not the conduct of the deceased, or plaintiff in a cause, constituted the exercise of ordinary prudence immediately before the accident occurred; for, since the performance of duty is the very embodiment of prudence, the statement by the witness that McDade was in the discharge of his duties, as a matter of law, was a statement by the witness that McDade was in the exercise of ordinary care. Legal negligence consists, for the most part, in the breach or omission of a legal duty. Between negligence and contributory negligence there is the difference merely between genus and species, and to constitute the latter there must be a want of ordinary care on the part of the plaintiff. Therefore, legal duty is the standard which determines the issue of negligence and contributory negligence, and it is the omission of this duty which alone constitutes both the genus and the species. Since prudence is the opposite of negligence, if one be in the discharge of his duty, the law determines that he is exercising prudence, and, therefore, for the witness to state that McDade was in the proper discharge of his duties was necessarily equivalent to stating that he was in the exercise of ordinary prudence.

We submit that it would have been proper for Hollowell, the witness, to have stated, as an expert, what the duties of McDade were, if he knew them; and, if he saw McDade immediately before the accident, he might have stated to the jury what position McDade occupied; but it was for the jury alone to say whether or not McDade was in the exercise of ordinary care, or what was its equivalent, whether or not he was properly discharging his duties. It was contended upon the part of the defendant below that McDade was not in the proper exercise of his duties, because it is admitted that it was a part of the duty of every railroad employe to note carefully the situation of all projections toward the track, and since McDade was thoroughly familiar with the situation of the Goodwin tank from experience, the defendant contended that it was his duty to have avoided the tank; yet this witness is allowed to state that he was in the proper discharge of his duties, and hence the assignment is valid, and the error was most harmful.

Again, it was error for the court to allow the witness to state that the customary position of a person riding upon the top of a freight car was a sitting position, and also to state what was customary upon the part of the employes of the defendant in this regard; for here, as before, the question was not what other employes did, nor was it an investigation of their conduct, but the issue was confined to an investigation of the conduct of the deceased, and the determination upon the part of the court and jury from this investigation whether or not the deceased exercised ordinary care. What other employes did shed no light upon this question, for other employes might have been careful or careless, according to the circumstances of the peculiar case that surrounded them, and it might be that in sitting down in one case they would be in the exercise of proper care, yet under other circumstances the fact that they were sitting down might convict them of gross negligence.

Now, the evidence that it was customary for brakemen to sit down upon the top of cars was not limited to the scene of the accident, but it was simply shown that they used their own pleasure with regard to the position that they assumed upon the top of freight cars. In brief, the defendant company merely required brakemen to perform their usual duties, such as switching, coupling and uncoupling, checking the speed of cars, and various other duties, in a careful, prudent manner; but left the particular

means or manner of performing these duties to the good judgment of its employes, and this was necessarily so from the nature of the employment; and, therefore, a mere statement that it was customary under some circumstances for brakemen to ride sitting down upon freight cars could throw no light upon the case, and could only have the effect of leading the jury to believe that McDade was in the exercise of due care, because under some circumstances it was customary for brakmen to occupy a sitting position, all of which was erroneous.

In support of this assignment, we cite the following authorities:

Rogers on Expert Testimony (2d ed.), p. 13: "The opinions of witnesses, whether experts or not, will not, according to some of the authorities, be received on the question whether a certain brake is safe or dangerous, or whether a stock car was a dangerous place for a person to ride."

See also p. 15: "The witness cannot be asked whether a person exercised due care, or whether a person was a careful driver, nor what is the ordinary, careful, prudent and safe manner of performing the services, nor whether the practice of a certain railroad in blowing its whistle was reasonable or unreasonable, or ordinary or extraordinary, nor whether the leaving of horses untied in a mill yard was the act of a careful and prudent man."

The best exposition of the rule that we have found is stated in Wharton on Evidence, Volume I., Section 434: "An expert has been defined to be a witness who testifies as to conclusions from facts, while an ordinary witness testifies only as to facts. This definition, however, is not sufficiently exact, and the true distinction is that the non-expert testifies as to conclusions, which may be verified by the adjudicating tribunal; the expert to conclusions which cannot be so verified. The non-expert gives the result of a process of reasoning familiar to everyday life. The expert gives the result of a process of reasoning which can only be mastered by special science."

Section 436, upon the same subject, is as follows:

"We will, elsewhere, see that, ordinarily, a witness cannot give his conclusions from facts, but must state the facts, leaving the drawing of conclusions to the court and jury. The same rule applies to experts in all matters as to which the lay mind is capable of forming a conclusion, and as to all matters of free logical inference from scientific

facts. Thus, an expert cannot be asked whether a railroad train stopped time enough for the passengers to get off, or whether it is safe to discharge passengers at a station or before reaching it, or whether it was prudent to blow a steam whistle at a particular time. So a farmer cannot be examined as to the sufficiency of bars to restrain cattle, nor can a person conversant with real estate be asked as to the peculiar liability of unoccupied buildings to fire; nor can baggagemasters, brakemen or conductors give their opinion as experts respecting the coupling of cars, and as to the danger a brakeman would incur by attempting to make a coupling under certain circumstances. So it has been held that the course which the owner of a damaged steamer ought, as a prudent man, to take, as to laying up for an examination and repairs on discovering defects in the engine which had been put into her under a contract, is not a question of science calling for the opinion of an expert. So, in an action for injuries to plaintiff caused by the upsetting of defendant's stage coach, in which plaintiff was a passenger, where a witness for the plaintiff on direct examination was asked to state if he knew, from his knowledge of the condition of the road at that time, what would be the chance for a stage coach to tip up, being driven by an ordinary careful, prudent driver. And on direct examination, he being asked whether or not, under certain circumstances, he would consider the stage overloaded, it was held that the questions were inadmissible as calling for the witness's opinion as to matters not involving professional skill, and concerning which the jury were to judge for themselves from the facts in evidence."

Mr. Wharton takes these illustrations as correct on the authority of the case of Railroad vs. Kellogg, 94 U. S., 469, where they are all cited, and to which case reference is especially made.

Hinds vs. Keath, 6 C. C. A., 232: "Asking a witness to say from his experience as a merchant whether an ordinarily prudent business man would go into partnership with another in his business without inquiring concerning it and and examining his books, calls for a conclusion which the jury could draw from the circumstances which might be proven."

Railroad vs. Myers, 11 C. C. A., 439: "Expert evidence is not competent to prove that a particular mode of coupling cars is especially dangerous."

Crane Co., vs. Columbus Co., 20 C. C. A., 234: "Upon a controversy over the quality of gas pipe guaranteed to stand a certain pressure in line where it is claimed by the seller that the pipe was injured in handling and laying after delivery, witnesses who supervised or participated in the work may testify that in their opinion the workmen were skillful, but the general question whether the line of pipe was laid with proper skill and care is not one to be determined upon the opinion of witnesses."

See also Motey vs. Marble & Granite Co., 20 C. C. A., 370.

Hunt vs. Kile, 38 C. C. A., 641: "Where plaintiff's intestate, while in the employ of the defendant, was killed solely by reason of the breaking of a rope provided by the defendant, and used in the work about which he was engaged, the only questions for determination with reference to defendant's negligence in action to recover for death are whether the rope was an ordinary and usual instrumentality in use for the purpose to which it was applied; and, if so, whether the defendant exercised reasonable care in its selection, and provided a rope of sufficient strength to sustain the strain to which it would probably be subjected; and such questions are not questions to be determined by the opinions of experts based on the hypothetical statement as to whether the apparatus was an ordinariiy safe and proper apparatus for the work for which it was used; but the question is to be determined by the jury, and from the facts in evidence; and the admission of such expert opinions is an invasion of the province of the jury, and erroneous."

On page 644 the court uses this language: "The province of the jury in this regard cannot properly be invaded by witnesses expressing their opinion upon the very subject which it was the duty of the jury to determine."

Rogers on Expert Testimony, page 32: "The opinions of experts are ordinarily inadmissible on questions of duty. Thus, it has been held that the opinion of tenders of draw bridges were inadmissible as to the necessity of keeping the gates shut, and the hanging out of lanterns for the proper protection of travelers while a draw was open in the night time. So, while witnesses cannot be permitted to express an opinion that a person performed a certain service in the manner required of him in the proper discharge of his duty; yet it is competent for any witness, having personal knowledge of the facts, to state what ser-

vices are performed by persons employed in a certain capacity in the discharge of their duty."

Now, this is the very distinction that we wish to draw in the case at bar. While it was competent for the witness to state as an expert what services are required of a brakeman in the discharge of his duty, it was alone for the jury to say whether or not McDade, the deceased, performed these services, and not for the witness Hollowell. This distinction is well set forth in the cases of Allen vs. Railroad, 57 Iowa, 626, and Railroad vs. Mackey, 33 Kas., 299.

The Iowa case uses this language in speaking of such testimony: "This testimony, in our judgment, is an expression of the opinion of the witnesses, which will plainly appear after a brief consideration. The witnesses declare certain acts of the deceased were within the line of the duty of a brakeman. While it was competent for witnesses to state as a fact what services were performed by the brakeman in the discharge of his duty, they ought not to have been permitted to express an opinion that a particular manner of performing such services was required of him in the discharge of his duty. The duty of a brakeman may be prescribed by the rules of the company, or by custom prevailing in the operation of railroads. It pertains to the particular service performed and the purposes to be accomplished. It may require him to couple and uncouple cars, to change switches, to check the speed of cars, etc. It requires him to do these things in a reasonably careful, prudent manner with a view to his own safety as well as the safety of his train. He is required to use appliances intended for the different work done by him. The discharge of his performance of the duty must be distinguished from the duty itself."

Thus, in the case at bar, it was the duty of McDade to give certain signals as he approached Goodwin Station; and Hollowell could have properly stated that this was his duty, but it was not the duty of McDade to stand on the car in any particlar position whilst giving these signals, having due regard to the fact that the train was about to pass the Goodwin tank, but it was necessarily his duty to so give the signals as to fulfill his obligation to his employer, both of performing the services required and of exercising due care to prevent injury to himself. It was for the jury alone to say from the acts detailed whether or not he performed his duty.

To the same effect see: Clark vs. City of Detroit, 32 Mich., 848; Olson vs. Tafford, 37 Wis., 330; Hart vs. Hudson River Co., 84 N. Y., 51; Hagerty vs. Railroad, 61 N. Y., 624; Bowen vs. Transportation Co., 71 N. Y., 574; Harley vs. B. C. M. Co., 142 N. Y., 37; King vs. Railroad, 11 S. W. Rep., 563; Bills vs. City, 35 Iowa, 108; Muldowne vs. Railroad, 36 Iowa, 463; Rapalje on Wit., p. 502.

Bailey on Master's Liability for Injuries to Servants, pp. 531 and 534: "An expert witness cannot state whether, upon a hypothetical state of facts, any particular manner or method is the ordinary, careful, prudent or safe manner of performing the service or act. Facts must be shown. The jury must reach the conclusion from facts." Simmons vs. Steamship Co., 99 Mass., 361; Lawson on Expert Testimony, p. —; Couch vs. Railroad, 22 S. C., 561; 12 La. Ann., 534; Way vs. Railroad, 40 Iowa, 346; Kelly vs. Fond du Lac, 31 Wis., 179; Lawson vs. Railroad, 64 Wis., 448; Meeks vs. Linder, 54 Vt., 640; Bemis vs. R. R., 58 Vt., 636; Monroe vs. Latin, 25 Kas., 352; Stame vs. Bishop, 58 Vt., 498; Amstein vs. Gardner, 134 Mass., 9; Turnpike Co. vs. Coover, 26 Ohio St., 520; Sowers vs. Duke, 8 Minn., 23; Brown vs. Turnpike, 89 Mo., 152; Enwright vs. Railroad, 33 Cal., 230; Hill vs. Railroad, 55 Maine, 439; Coates vs. Railroad, 62 Iowa, 486; Hopkins vs. Railroad, 78 Ill., 32.

Fourth—The court erred in admitting, over the objection of the defendant below, the following question and answer:

"Q. State what his character was with reference to his efficiency or inefficiency, carelessness or prudence.

"A. He was always very careful in handling trains, doing work, or anything of that kind." (Record, p. 50.)

Here the court allowed proof of the general reputation of the character of the deceased with regard to carefulness and prudence to be considered by the jury in determining whether or not the deceased exercised due care at the time of the accident, which issue was one sharply drawn and earnestly debated.

There are two grounds of objection to the admission of this evidence:

First—That the manner in which McDade had handled other trains, had done his work, and everything of that kind, had no relevancy to the question how he acted at the time of the accident.

Second—That the evidence was merely an expression of opinion of the witness as to the intestate being a careful, prudent man.

First—Was the evidence relevant? All this witness could say was that, on the different occasions, where the conduct of the intestate had been noticed by the witness, the intestate had been careful in handling trains. It is obvious that there are many degrees of care, from the slightest to the greatest; and it is likewise obvious that the circumstances of different cases determine whether or not due care has been shown, the test of proper care being usually determined by the dangers to be reasonably apprehended on account of a failure thereof, and the act under discussion is affected and given character by all of the relevant circumstances surrounding the transaction. This is manifest, since every case has its peculiar circumstances, and these must be taken into consideration in determining whether or not in a particular case reasonable care was exercised. Hence, what might be reasonable care in one case might fall far short of it in another.

Consequently, the conduct of the plaintiff upon other occasions would not tend to show whether his conduct was careful or careless upon the occasion in question; and, furthermore, in each instance, when the conduct of the intestate was under the notice of the witness, there might be made a question whether in fact care was exercised by the intestate, involving a long investigation, thus causing the minds of the jury to leave the main issues in the case and seek the by-paths of collateral investigation.

Second—With regard to the second ground of objection, the witness testified, in effect, that deceased was a careful and prudent man. If the witness intended to be understood, and was understood as stating that the intestate acted carefully and prudently on other occasions, then we have already disposed of this question; but if the language is construed to mean that the character of the intestate for prudence and care generally was good, then manifestly the evidence was merely the expression of a naked opinion. It would be simply saying that the witness had seen the intestate on various occasions act with care and prudence in the handling of trains, and that his conduct on these occasions was sufficient to satisfy the witness that the intestate had a good character for prudence and care, which would lead the intestate to exercise

those qualifications on all occasions in the management of trains. This would be necessarily the expression of an opinion, or conclusion, which the mind would arrive at by a process of reasoning from the evidence.

Furthermore, care, or reasonable care, is a deduction from all of the facts of a particular case, which must be carefully considered in order to ascertain whether or not it was exercised, and thus the jury would be required to determine the conduct of the deceased upon all of these occasions.

Upon the question concerning the admissibility of evidence of the general character or reputation for prudence or care upon the part of a party to the record, we cite the following authorities:

Morris vs. East Haven, 41 Conn., 252, holds: "In an action against a town for an injury to the plaintiff's intestate through a defect in the highway causing his death, the plaintiff, to prove the intestate was driving with ordinary care, called several witnesses, who, having testified that they had seen him drive horses, were asked if he was a careful driver. Held: That the inquiry was inadmissible, both as calling for a mere opinion and on the ground of irrelevancy."

From the case just quoted our reasoning upon this assignment has been taken, together with much of the language thereof. Railroad vs. Conlan, 101 Ill., p —; Coates vs. Railroad, 62 Iowa, 486.

Bryant vs. Railroad, 56 Vt., 712, uses this language, Royce, C. J.: "The first exception urged by the defendant is to the exclusion of the testimony of its roadmaster as an expert, as to whether or not McNulty, the defendant's section foreman, who had charge of the section where the fire originated, was a careful, prudent and attentive man in the discharge of his duties. It is claimed that the evidence offered was admissible upon the question as to whether or not the defendant had used all due care and diligence in its management of the railroad. The rule laid down in Pierce on Railroads, 296, and abundantly sustained by authority, excludes expert evidence on matters equally within the knowledge of the jury, or of unskilled persons, or upon the ultimate fact to be proved by the jury, and various instances are cited, which on principle exactly meet this case. The character of McNulty for care, prudence and attention in the discharge of his duties must be decided on the evidence of his acts in this case, and upon

these the jury was quite as capable of forming an opinion as any expert could be. Besides, general evidence of care and prudence at other times would have no tendency to prove care in this particular instance."

Directly in point, and controlling upon this court is the case of Delaware, L. & W. Railroad Company vs. Converse, 139 U. S., 469-477, where this language is used:

"Another error assigned is the refusal of the court to allow proof by the defendant of the fact that the manner in which the plaintiff crossed the railroad tracks between 6 and 7 o'clock in the evening on his way from Jersey City to the country farm, showed negligence upon his part. Plainly this evidence was irrelevant. It did not in any wise illustrate the issue as to whether the defendant was guilty of negligence or whether the plaintiff was guilty of contributory negligence two hours later in the evening, when the plaintiff, returning from the country farm, attempted to cross the railroad tracks."

This exact question has likewise been decided by the United States Circuit Court of Appeals, Eighth Circuit, in the leading case of Harriman vs. Pullman Palace Car Company, 29 C. C. A., 194, where this langauge is used: "The sole question for consideration on the present record is whether prejudicial error was committed by the trial judge in permitting the defendant company to introduce testimony tending to show that the porter, through whose fault the injury complained of was alleged to have been sustained, was usually careful, competent, courteous and attentive. Such testimony was admitted during the progress of the trial, over the plaintiff's objection, and to its admission counsel for plaintiff duly excepted. The rule is well established by many authorities that an employer, when sued by one who has sustained an injury in consequence of a particular negligent act on the part of his servant, is not at liberty to disprove the charge by evidence tending to show that the servant was a person of general good repute, who, in the discharge of his duties, had always theretofore displayed the requisite skill and caution, because such evidence is not relevant to the issue, and is only admissible in those cases where the master is accused of having knowingly employed an incompetent servant. Persons sometimes fail to exercise ordinary care, although as a rule they are careful, and for this reason proof that the servant is generally prudent and cautious has no necessary tendency to show that

on a particular occasion he was not negligent. Besides, the practice of establishing the quality of one's act in a given instance by his conduct at other times, or by his general line of conduct, would have an inevitable tendency to create collateral issues. When, therefore, a complaint does not charge incompetency, but simply alleges that an employe acted carelessly on a given occasion, the proof should be confined to his acts on that occasion, and should not embrace an inquiry concerning his conduct on other occasions, or his general conduct, which is a subject in no wise involved in the issue." Thompson vs. Bowie, 4 Wall, 463; McDonald vs. Inhabitants, 110 Mass., 49; Towle vs. Improvement Co., 98 Cal., 342; 33 Pac., 207; Adams vs. Railway Co. (Iowa), 61 N. W., 1059; Connors vs. Morton, 160 Mass., 333, 335; 35 N. E., 860; 2 Thompson Neg. p. 804; Jones Evidence, Art. 162.

It may be contended by opposing counsel that this evidence was admitted solely for the purpose of showing the value of the life of McDade to his family, but we submit that this was clearly shown by the testimony of his wife, who testified concerning the amount of money that McDade gave to his family each month; and, again, even if it were competent for Hollowell to testify concerning his general character as a man, this point was made by his answer on page 49 of the Record, that McDade's character was first-class, and that he was a first-class railroad man in all respects, and, therefore, it was unnecessary and improper for the plaintiffs to go further and show his reputation for carelessness or prudence.

While it is true that there is some authority holding that in cases where no one witnessed the accident, that evidence of the habits of the deceased may be introduced in order to rebut any presumption of contributory negligence upon the part of the deceased, this rule, however, irrespective of its logical soundness, can have no place in the courts of the United States. It is founded upon the idea that the burden of proof upon the question of contributory negligence is upon the plaintiff below, while the rule of the United States courts is to the effect that the burden of proof upon this point is upon the defendant; and an examination of these cases will show that they are all decided in jurisdiction where the burden of proof upon the question of contributory negligence is upon the plaintiff. Thus, there could be no legitimate object in the proof, as an original proposition, that the habits of the plaintiff

showed him to be a prudent man, if the law presumes that he acted prudently in the case at bar. Again, upon principle, these cases are not sound, because they proceed wholly upon the theory that there are no eye-witnesses to the accident, and even in those jurisdictions wherein this rule obtains such evidence is not admissible when there is an eye-witness to the transaction. This theory cannot be sound, for the reason that evidence is not rendered competent or incompetent in personal injury suits merely because of a lack of eye-witnesses. Any evidence which would be competent in one case would certainly be competent in another. To illustrate: If the facts of an accident be narrated by witnesses, yet if the facts be such as to lead reasonable men to differ concerning the conclusions to be drawn from these facts, if the theory of these cases be correct, and if in any wise general character has a tendency to characterize a particular act, certainly it should be admitted to carry the balance one way or the other. Thus, in criminal cases, for a long time the idea was advanced that it was only in cases where the evidence was evenly balanced that evidence of the good character of the defendant could be proven, but this theory has been abandoned, for, as Mr. Wharton well says: "Frequently evidence of character makes a case evenly balanced and results in the acquittal of the defendant."

The great weight of authority is in favor of the proposition that evidence of the general character of the deceased for care and prudence, is incompetent.

Gahagen vs. Railroad, 1 Allen, 189, Hoar, J.:

"The exceptions show that the principle issue in the case was upon the unreasonable or negligent conduct of the defendant's servants in the use of the highway at the time the plaintiff's intestate received the injury for which she seeks compensation. We think their habits at other times had no legitimate bearing on the issue, and that evidence respecting such habits was properly excluded."

Robinson vs. Railroad, 7 Gray, 92: "The defendants could not have shown their general carefulness as an excuse for their conduct at the time in question. The cases cited by plaintiff depend upon a different principle where the acts proved might fairly be regarded to be a preparation for or commencement of the principal fact to be established, and hence the plaintiff could not be allowed to prove the general reputation of the defendants for carelessness."

Kenney and wife vs. Tuttle, 1 Allen, 185, is as follows: "In an action for an injury received from a collision of carriages in the highway, in which the negligence of the defendant consisted in leaving his horses on his own land near the highway without being tied or under the charge of any person, evidence that the defendant was a careful, prudent and cautious man is inadmissible to negative the want of ordinary care upon his part."

To the same effect see Buxton vs. Potters Works, 121 Mass., 446.

Breman vs. Township, 67 Wis., 223: "In an action for personal injuries sustained by plaintiff while riding on horseback by reason of a defect in the highway, evidence that he was an habitually reckless and careless rider is inadmissible."

Chase vs. Railroad, 77 Maine, 64, holds as follows: "The intestate Schlay collided with a train at a railroad crossing; he thereby received injuries and soon after died. He never was conscious enough after the injury to tell how it happened. No one was with him at the time. No one saw him at the moment of the accident. As evidence that he could not have been guilty of any negligence which contributed to the accident, witnesses who had been his neighbors for some time were permitted to testify to their opinion to his general character for carefulness. We think this was over-stepping the limit allowed to collateral evidence in this State. We dare not abide by it. Our belief is that such a rule would be fraught with much more evil than good. If in civil cases a person's character proves carefulness in one instance, why not in all? When and how can a true line of distinction be drawn, for if by such proof a plaintiff can be shown to have been careful in one case, why not by the same mode of proof show that a person acted carefully or carelessly in every case? In many litigations under such a test there would arise a wager of character which would as unfairly settle the dispute as did formerly the wager of battle. If the intestate's general character for care be in issue, why not that of the engineer, and of every man concerned in the management of the train?"

To the same effect, see Elliott vs. Railroad, 41 N. W., 762, wherein this language is used: "The correct determination of this question should not be made to depend upon the fact whether the deceased was usually careful or careless, but on his conduct at the time of the accident."

Allen vs. Railroad, 57 Iowa, 626; Rowl vs. Fowler, 37 Conn., 348; Cook vs. State, 24 N. J. L., 843; Railroad vs. Ellison, 117 Ind., 234; City vs. Springfield, 166 Ill., 22; 39 Fla., 535; 68 Georgia, 236; 102 Ala., 193; 55 Kas., 62; 97 N. Y., 112.

Rogers on Expert Evidence, page 32, uses this language: "The opinions of experts are ordinarily inadmissible in questions of duty." Black on Accident Cases, Sec. 39; Sherman and Redfield on Neg., Sec. 207; Beach on Contributory Neg., Sec. 21, note.

Sixth—The court erred in admitting, over the objection of the defendant, the following questions and answers:

"Q. State whether or not, if he desired to get in such a position; that is, to descend on the ladder for the purpose of looking at anything or making any investigation, what is customary with reference to carrying his lantern?

"A. He would not have left his lantern there if he had went down the ladder. He would have taken his lantern with him.

"Q. His lantern was, as you have stated, in a position?

"A. That he would naturally place it in after he had finished giving the signal.

"Q. And in the position a brakeman would naturally place it after sitting down on the north or right-hand side of the grab iron?

"A. It would be, evidently, when he leaned out to pass the signal to the engineer that he would hold the grab iron with his left hand, with his lantern in the right, after being in that position passing it from the side of the car, making it more convenient for the engineer to see him, he would pass around the lantern to where his left hand was."

These questions and answers were objected to, and which objection being overruled, defendant excepted.

The admission of this evidence is so clearly erroneous that extended argument upon it is unnecessary. The witness had already testified to the position upon the car in which McDade's lantern had been found. He had likewise testified that the last time he saw McDade was when he was giving the signal as the train approached Goodwin Station. Now, to allow the witness to state that the lantern was found in a position that McDade would naturally place it in is to allow the witness to speculate upon McDade's character, after he had ceased to pay any attention to what McDade was doing. It will be noted that

the witness does not state that he saw McDade place the lantern upon the car, but merely gives an opinion that it was found in a place that McDade would naturally have placed it.

Again, the next question and answer is necessarily erroneous in that it allows the witness to enter into a speculation with regard to the conduct of McDade when he admits that he did not see McDade pursue this course of conduct. Let us briefly analyze it. He says, in speaking of the lantern and the conduct of McDade: "It would be, evidently, when he leaned out to pass the signal to the engineer that he *would* hold the grab-iron with his left hand, with his lantern in the right, after being in that position passing it from the side of the car, making it more convenient for the engineer to see him, he would pass around the lantern to where his left hand was."

By the use of the word "would," and also the phrase, "Making it more convenient," it is evident that the witness was merely speculating upon the conduct of McDade with regard to giving the signals and placing his lantern; and it in effect allows the witness to state that in his opinion the theory of the plaintiffs with regard to the position that McDade occupied upon the car was a reasonable theory, and one naturally to be expected of a brakeman in the discharge of his duties and situated as McDade was situated shortly before and at the time of the accident.

IV.

The court erred in admitting, over the objection of the defendant, the following evidence found in the direct and re-examination of R. H. Briggs, a witness for the plaintiff:

First—"Q. Mr. Briggs, describe the relative positions, as near as you can, of the water spout with reference to a passing train.

"A. Well, it should be cleared.

"Q. How much should they clear?

"A. I cannot tell you exactly; I have never located a tank myself. There is a regular standard that the road department conforms to. I know that they must absolutely clear it.

"Q. You say they intend and construct the standard tanks so that the spout should be in a vertical position when not in use?

"A. So that it will clear everything.

"Q. What do you mean by everything?

"A. Anything in the way of the car, or a person on top." (Record, p. 65.)

The error here complained of is that the witness was allowed to state that, according to the regular standard of the road department of the Kansas City system, the spout should clear everything, and, further, to state that by everything he meant anything in the way of a car and person on top. Here the witness was allowed to state the effect of the construction of water spouts upon the Kansas City system with regard to persons on top of cars, which effect was the very issue that the jury were to try.

Again, the witness admits that he was not familiar with the custom generally on well regulated roads throughout the United States with regard to the construction of water tanks, but merely testifies what the construction of such tanks was upon the Kansas City system. (Record, p. —.)

Thus, error is committed by allowing the witness to compare the construction of the tank at Goodwin Station with the construction of tanks upon the Kansas City system, which question was not at issue—the question at issue being whether or not well regulated railroads throughout the United States constructed tanks in a like manner with the one at Goodwin, not as to whether any particular road constructed tanks similar or dissimilar. Now, it was perfectly proper, if Mr. Briggs had been generally familiar with the construction of tanks upon well regulated roads throughout the United States, to testify that the spouts hung vertically; but, even had he so qualified, it was improper for him to state that the effect of hanging these spouts vertically was to clear everything upon the car, irrespective of the position the brakeman occupied, and irrespective of the fact of the brakeman being in the discharge of his duty.

Second—The court erred in admitting, over the objection of the defendant, the following questions and answers:

"Q. Now, Mr. Briggs, suppose the spout did not go up to a vertical position when not in use, what would that show?

"A. It would show that the weight struck this crosspiece too soon, or that the chain is too long. I could give further information how this does happen.

"Q. Do that.

"A. Oftentimes the spouts get rammed up, or smashed through the carelessness of the firemen in taking water, and they have to take the spout off and put another on; and the other spout is generally in the shop ready for an emergency of this kind, and in making the spouts in the shop they are not particular in getting the same size, so the band will go up a little further and then won't go down so far. The result is this will strike too soon, and the spout won't go up high enough, and the weights don't come down here by some distance." (Record, pp. 66 and 67.)

Here the court committed error; first, by allowing the witness to state that if the sway spout of a water tank does not go up to a vertical position when not in use that this would show that the weight struck this cross-piece too soon, or that the chain is too long. This was in effect allowing the witness to state that if the sway spout, when not in use, did not return to a vertical position that the appliances used to work the same were defective in the fact that the weight struck the cross-piece too soon, or that the chain was too long.

Thus, the evidence violated the rule fully discussed above, viz., that a witness cannot testify that a particular device is unsafe, dangerous, imprudent, or that its construction shows negligence upon the part of the defendant. We submit that this is the only construction that can be placed upon the language of the witness' answer, for when a witness states that a certain construction shows that a chain is too long, or that a weight is too heavy, manifestly the use of the weight and of the chain is the use of a defective appliance.

Second—The witness was allowed to illustrate and give what, in his opinion, was the reason why sway spouts upon water tanks do not hang vertically when in use. He states as follows:

"Oftentimes the spouts get rammed up, or smashed through the carelessness of the firemen in taking water, and they have to take the spout off and put another on; and the other spout is generally in the shop ready for an emergency of this kind, and in making the spouts in the shop they are not particular in getting the same size, so the band will go a little further and then won't go down so far, and if they won't go down so far the result is this will strike too soon, and the spout won't go up high enough, and the weights don't come down here by some distance."

Now, Mr. Briggs did not pretend to know anything about the management of the Choctaw, Oklahoma & Gulf Railroad with regard to its water tank at Goodwin, or of any other place upon the road; yet, over the objection of the defendant, he is allowed to state that the reason why spouts upon water tanks upon railroads do not hang vertically when at rest is because firemen of the said companies are careless, and because shopmen who construct the spouts are careless.

With due deference to the trial judge, we submit that there is no authority which in any wise tends in the slightest to support his decision in admitting such evidence. At best, it was a mere speculation upon the part of the witness as to why spouts upon railroads generally did not hang vertically when at rest. That this error was hurtful is manifest, because it impregnated the jury with the idea that the only reason why sway spouts did not hang vertically was because firemen and shopmen were guilty of carelessness; and this evidence came from a witness who did not know or pretend to know, either of his own knowledge or from hearsay, whether or not such was the fact upon the Choctaw, Oklahoma & Gulf Railroad Company.

Third—The court erred in allowing the witness Briggs to testify as follows:

"Q. Now, Mr. Briggs, you say the spout automatically goes back to a vertical position when the chains are of the right length, and the band around the spout is in proper condition. Now, assuming that the slant of the spout, when the weights rest on the floor or the platform, that is, when the spout is not in use, then the slant amounts to as much as 2 feet and 8 inches—in a length of 9 feet, the spout being 9 feet long—the slant 2 feet and 8 inches in that length. Please state whether that would conform to the present state of the art and of the standard tanks and spouts.

"A. It would not be as I would want to have it."

Defendant objected to this last answer, as well as to the last question, which objection the court overruled, and the defendant duly excepted.

"Q. What is the cause of it being at this angle, so that it would not clear the car?

"A. Different causes; one, the spout might have been damaged and they had to change it. If the ring of the spout is here, and they get another spout with the ring here, that makes the chain too long, and it hangs over.

They might put new chains on, but that seldom happens. But the main cause is the spout gets mashed. The fireman will give the engineer the signal, and the first thing he goes and smashes it, and they send another spout, and the men are not particular enough about putting this band in the right place, and that will control the position in which the spout hangs." (Record, pp. 67, 72, 73.)

Here the court allowed the witness, in answer to a hypothetical question based upon the evidence of plaintiffs concerning the measurements of the Goodwin tank, to state that the construction was not as the witness would like to have it. Now, the question in this case was not what the witness would like to have, but whether or not the construction of the Goodwin tank was such a construction as was generally used upon well regulated roads.

Again, upon pages 72 and 73 of the Record, the above mentioned errors were accentuated on the re-examination of the witness by plaintiffs' counsel. Thus, the following questions and answers were admitted:

"Q. Speaking of spouts on your road, state whether or not, from your observation, the spouts all hang in a position so as to clear any car or person on the car?

"A. It often happens that they do not. That is what we foremen and master mechanics are for—to make men do their duty.

"Q. What is it caused by when they do not hang that way?

"A. Inattention to their duty. They do not go according to instructions."

Then comes the question and answer especially complained of in this assignment. It will be thus seen that the witness was allowed to state that in all cases where the sway spouts upon tanks did not hang vertically when at rest that the reason therefor was because those who had charge of the management thereof were inattentive to their duty and did not obey instructions—or, in short, were guilty of carelessness.

And, again, he repeats the error complained of in subassignment 2 by stating that the firemen are careless, and improperly give the engineer signals; that the spouts are thereby smashed; that then another spout is sent for, and the men in the shop are careless and do not send a proper spout. It was in no wise competent to show that firemen and shopmen were careless on the Kansas City system as tending to show that employes were careless upon the

Choctaw system; while if the witness meant to say that the employes were careless on all roads throughout the United States, his evidence is incompetent, because he does not pretend to have any personal knowledge to that effect. The admission of this evidence was, in effect, allowing the witness as an expert railroad man, having had fifty years of experience, to state that in his opinion that both firemen and shopmen are usually careless persons, and without any personal knowledge state whether or not they were careless or careful in the case at bar.

We submit it would be improper for counsel, even in the heat of argument to make such a statement, even if the evidence showed the grossest carelessness in the case at bar, and we likewise contend that it would have been error for the trial judge, upon proper objection, not to have corrected counsel therefor, yet this evidence is admitted in a much more harmful form, and with the sanction of the lower court.

V.

The court erred in admitting the following evidence, found in the testimony of W. D. Kennedy, to-wit:

First—"Q. Now, from the way the lantern was moving at the time you saw him giving the signal, what was your best impression at that time as to his position on the car?

"A. Well, now, I'll tell you. It was a warm night—a night, in other words, that was not hard on the brakeman. The brakeman generally sits on the car. It would have been on the west end of the car at the side of the ladder, and I judge he would be sitting down, because it is easier to ride sitting than it is standing." (Record, p. 84.)

The court erred in admitting this evidence, for thereby he allowed the witness to state the mere fact, because it was a warm night, because brakemen generally sit on cars, and because it was easier to ride sitting down than standing up, that he (the witness) came to the conclusion that McDade was sitting down when he gave the signal as the train approached Goodwin Station.

Now, W. D. Kennedy nowhere states that he knew from personal observation the position that McDade occupied when the signal was given; but, on the contrary, on pages 83 and 84, he testified as follows:

"Q. What was Mr. McDade's position on this car at the time he was giving this go-ahead signal?

"A. That I don't know.

"Q. Did you see his lantern moving?
"A. Yes, sir.
"Q. Where was the lantern?
"A. The lantern seemed to me moving on the side of the car; he seemed to be giving the signals on the side of the car.
"Q. Which side of the car?
"A. Right-hand side."

Then follows the question and answer objected to. Now, it is true the question does not ask the witness to state the position of McDade from the way the lantern was moving, but the answer specifically states that the witness judged the position of McDade from the fact that it would be more convenient for a brakeman to be sitting than standing at this place, and this in connection with the specific statement above mentioned that the witness did not know McDade's position from personal observation, conclusively shows that our argument upon this point is correct.

We earnestly contend that the admission of the opinions and speculations of the witnesses Hollowell and Kennedy are reversible error.

There were no eye-witnesses to this accident, and the plaintiffs were allowed to map out a theory of the case, and to support this theory, not by the proof of actual facts, but by the speculation and opinion of witnesses as to whether or not such theory was reasonable, and if the evidence above complained of in assignments III., IV. and V. had been excluded the plaintiffs' case must necessarily have failed.

Again, one of the main issues in this case, and so recognized by the lower court, was contributory negligence upon the part of the deceased; and here this evidence was most harmful, because plaintiffs' witnesses were allowed to state that McDade was in the performance of his duty when last seen; that in the opinion of the witnesses he was sitting in a position where he could have been struck by the spout, and that his lamp was in a position that he would naturally place it in after having given the signal from a sitting position.

Again, one of the main issues was whether or not McDade was actually struck by the spout, and upon this point this incompetent evidence bore most strongly in favor of the plaintiffs.

VI.-VII.

The court erred in admitting the following evidence, found in the direct testimony of Dr. Frank Smythe, a witness for the plaintiffs, to-wit:

VI.

First—"Q. Doctor, assuming that the man was sitting on the side of the edge of the car, with his legs hanging over the side of the car, the car between 13 and 14 feet high, and being a part of a train which was running at a rate of speed, say, between 20 and 25 miles an hour, that he was found on the side of the track on which the train was moving, in the condition and with the injuries such as I have above described to you, please state whether or not, in your opinion, if you have an opinion of a reasonably certain character, whether such condition could or not have been produced by falling from said car in that position on level ground?"

Counsel for defendant objected to said question, which was overruled, and defendant excepted.

"A. It is a matter that I cannot give an answer to with any degree of certainty, for the reason that several things enter necessarily into the infliction of an injury. It is possible."

Counsel for defendant objected to what is possible.

"Q. If you say that you can, with reasonable certainty, give an opinion as to whether those injuries, such as I have described to you, could or not have been produced by falling from the car, running at that rate of speed, under the conditions described, please give such an opinion.

"A. My opinion is that a single blow could not have produced such an extensive injury as you have described. That is all I can say. My opinion is that a single blow could not have produced such an injury as you have described."

Second—"Q. Doctor, please state whether or not, in your opinion, falling from the side of a car on the ground, where the ground is of such a nature or surface as to receive impressions of footprints, whether falling from the side of a car 13 or 14 feet in height would produce such injuries as that."

To this question counsel for defendant objected, the court overruled the same, and the defendant excepted.

"A. It is possible, Mr. Fitzhugh, for an extensive injury to result from a fall of that height, going at the rate

of speed, and coming in contact with the ground, without some interruption from the fall. I can readily see how a very extensive injury could result, but I cannot see how it would produce such lesions and such things in one blow; but a man going at that rate and falling from that height, it would produce an extensive injury.

"Q. Are these injuries, in your opinion, produced by a blunt instrument? Would a pipe 10 inches in diameter, if a person came in contact with it while the train was running 20 or 25 miles an hour, be such an instrument as would produce such injuries?

"A. There comes the question again. I don't think a blow from the pipe would produce it all, but I am satisfied that a blow from the pipe would produce the injury to the jawbone. I don't think the scalp wound and the wound on the opposite side of the face could have been from the pipe fixed in an immovable position. It would cause great injury to soft parts."

To this question and answer defendant objected, and upon the court overruling the objection, duly excepted.

Third—"Q. In your opinion, please state whether or not the conditions and injuries described to you could or not have been produced by a combination of blows, viz., the blow from such a pipe, where the party's head comes in contact with it, when he is on a train running 20 or 25 miles an hour, and is knocked from the car, after such blow is received, falling to the ground."

"A. Yes, sir; I think the combination of blows would account, under the circumstances, for the condition the man was found in.

"Q. In your opinion, neither the falling from the car nor the blow from the pipe, under these circumstances, alone could produce that combination of injuries?"

"A. Not alone; no, sir. I am not prepared to say what happened when he fell."

To this last question and answer defendant objected, which objection was overruled, and defendant excepted.

VII.

The court erred in admitting the following evidence, over the objection of the defendant, found in the direct examination of Dr. Webb, a witness for the plaintiff, to-wit:

"Q. Please state whether or not the injuries, such as you have described, and in addition assuming that the

jawbones were crushed, and that he had a large scalp wound on the left side of his head near the rear, whether such injuries could have been produced by a fall from a car 13 to 14 feet in height, running at a rate of speed 20 to 25 miles an hour, if the party were sitting on the side and edge of the car, and fell on level ground, whether those injuries could have been produced alone by such a fall?

"A. I don't hardly think it could.

"Q. Please state whether or not such injuries as you saw, and in addition thereto the injuries which I have just described to you, could, in your opinion, have been produced by the party coming in contact with an iron pipe about 10 inches in diameter, the pipe striking him on the head, while in the position on the side of the car, moving at from 20 to 25 miles an hour, and his falling thereafter to the ground?

"A. Yes, I think it would, all right.

"Q. But the mere fall under these circumstances, in your opinion, could not have produced those injuries?

"A. I don't see how it could; it might have done it."

To all this evidence of Dr. Webb the defendant objected, and upon the objection being overruled by the court, the defendant excepted.

The admission of the testimony of Dr. Frank D. Smythe and Dr. Webb was a violation of the rule in regard to opinion evidence, and the holdings of the judge upon the subject were manifest and reversible errors.

In reply to a question of the plaintiff as to what blow or blows would probably cause the injuries shown to exist on the body of the decedent, Dr. Smythe said: "It is a matter that I cannot give an answer to with any degree of certainty, for the reason that several things enter necessarily into the infliction of an injury. It is possible." In other words, before he commenced his testimony Dr. Smythe admitted that the testimony he would or could give in regard to the cause of the injuries received by the decedent would be a mere matter of conjecture. The guess of an expert is no more to be received in evidence than the conjectures or theories of any other witness. This exact point has been adjudicated in favor of the contention of the plaintiff in error in Muller vs. Gillick, 66 Mo. App., 500. Here it is said: "A witness is not qualified to express an opinion as to a matter of expert opinion when

he admits his testimony would be a mere guess." See Gregory vs. N. Y., L. E. & W. R. R., 55 Hun, 330.

On this ground alone the admission of the evidence of Dr. Smythe, after he had qualified it in the manner above shown, makes all of his opinions improper testimony to go before a jury.

But even had Dr. Smythe not admitted that his testimony would be pure conjecture or supposition, there would still exist a valid objection to its admission. It would be presumptuous to announce the reason to this court for the rule that opinion evidence is not admissible unless it be the opinion of an expert, *in a matter where expert evidence is necessary.* Mr. Greenleaf, in his authoritative work on the law of evidence, page 550, section 441 (16th ed.), says: "There is, therefore, no rule admitting opinions or inferences when made by one class of persons—experts—and excluding them when made by another class—laymen—but there is a rule excluding them when they are superfluous, and admitting them when they are not." This rule laid down by Mr. Greenleaf is universally followed.

In N. C., etc., R. R. Co. vs. Carroll, 6 Heisk., 368, the court refused to allow expert testimony upon a question whether or not a certain obstacle on the track was an obstruction. "This is a matter," the court said, "which would be within the cognizance of any man, and it does not take an expert to decide the question."

Another statement of the expert rule is made by the U. S. Supreme Court in the case of Milwaukee & St. Paul R. R. Co. vs. Kellogg, 94 U. S., 449. The court declares: "One of the cardinal rules governing the admission of expert evidence is that it must usually not alone be given by an expert, but must also be of such a character as not to fall within the range of common experience and observation, and, therefore, not to be intelligible to jurors without the aid of opinion."

Was there any need for expert opinion to decide the question whether or not the injuries produced upon the body of the deceased were caused by one single blow or by two simultaneous or successive shocks? It would seem that the veriest layman would have been able to tell from the testimony, just as well as an expert, whether or not a wound on the left side of the head, and one on the front and near to the right side, could or could not have been produced by a single blow from any instrument. To introduce physicians, therefore, to pass upon this fact was to

usurp the functions of the jury, and to take from their consideration matters which were excessively within their province.

Upon this very question of the number and size of the wounds and the position of the deceased at the time they were received there have been numerous adjudications. In Manufacturers' Accident Indemnity Co. vs. Dorgan, 7 C. C. A., 581, the following question was asked: "If he had been standing, would it have been possible for him to have fallen into the water in the position in which they found him?" Counsel objected to this question, and the court held that the objection was properly sustained. This case is one that was decided by the United States Circuit Court of Appeals, and is therefore of especial value in this case.

In Kennedy vs. People, 39 N. Y., 245, the court said: "The form, length, etc., of the wounds, with their precise location on the head, with the amount of force necessary to produce them, and the probable shape of the instrument being shown, it is not competent to receive the opinion of the surgeon as to the probable position of the deceased when the blows were received. Surgeons are not supposed to be experts in the matter of giving and receiving such blows, and the jury are equally capable of drawing the proper inferences from the facts proven, if material." And further: "But on what ground it can be said that it requires the peculiar science or professional skill which physicians and surgeons possess to determine the position in which a man may be struck on the top of his head, I am not able to perceive."

In People vs. Hare, 57 Mich., 505, it was declared to be improper to ask a question of an expert, the answer of which involves his opinion as to what caused a wound of the deceased. In accord, Hitchcock vs. Burgett, 38 Mich. 501.

A question almost exactly in line with the present one was raised in the case of the Lake Shore & C. R. R. Co. vs. Shook, 16 Ohio Circuit Court, 665. The court said: "The question as to whether the deceased met his death by being knocked off a car, or by slipping off, is not a question for a medical expert."

The opinion of a physician as to whether the fact that the cart in which the plaintiff was riding was upset and dragged 200 feet by the car, would cause the injuries complained of is not admissible. Chicago City Ry. Co. vs. Smith, 69 Ill. Ap., 69.

The above cases declare correctly the rule as to the scope and limit of expert medical testimony. None of these rules were properly observed in the admission of the testimony of Drs. Webb and Smythe. Dr. Smythe was not only permitted to give his opinions, after he had admitted that all of his testimony would be a matter of conjecture, but he was allowed to testify as to whether or not one or two blows could cause the injury. (Record, pp. 212 and 213.)

He was also permitted to state whether or not the blows could have been produced by contact with the nozzle of the pipe. Dr. Webb was allowed to bring before the jury an exactly similar line of testimony; and, under the rule laid down in the above quoted cases, this was a double error in both cases:

First—Because the question was not one upon which expert evidence was required; and,

Second—Even though expert testimony were admissible in general, the particular facts as to the cause of the injury which were elicited from Drs. Smythe and Webb were not competent testimony. They were, in effect, allowed to decide the question whether or not the deceased had slipped from the car or had been knocked off, in direct contradiction of the correct rule, as laid down in Lake Shore, etc., R. R. Co. vs. Shook, supra.

The form of the questions asked Drs. Smythe and Webb was also objectionable. Dr. Smythe, in particular, was not testifying from any personal knowledge in the matter, but was basing his opinions wholly upon the hypothetical questions which had been propounded to him.

In North American Association vs. Woodson, 12 C. C. A., 692; 694 Federal, 689, it is said that it is error to permit a hypothetical question based upon suppositions which there is no evidence to support. In accord, Clarke vs. Riter-Conley Co., 57 N. Y. State, 755.

In the first case cited above questions were propounded to a medical expert which assumed that the deceased had fallen from a point near the top of a ladder on which he was standing. It had been shown in the case that the deceased did fall from such ladder, but there was no evidence to prove that the fall was from a point at or near the top.

In Green vs. Roark, 56 Pac., 329, it is said: "A party should not be permitted to ask questions which are neither

supported by the evidence, or the deductions to be drawn from the evidence."

In People vs. Harris, 33 N. E., 65; 136 N. Y., 423, it is said: "Hypothetical questions are properly excluded when there is no foundation in the case for the facts assumed."

The hypothetical questions propounded to Drs. Smythe and Webb assume in every case that the deceased was sitting upon the edge of the freight car, with his body in a certain position, and his head in an assumed direction. There was no proof in the case directly tending to show that such was the position occupied by the deceased, and to permit hypothetical questions to be based on such a supposition was manifest and reversible error.

Hypothetical questions, moreover, must be based upon all of the important suppositions or facts which have been established in the case. Western Ins. Co. vs. Mohlman, 28 C. C. A., 168; Livingstone vs. Sands, 81 Ill. App., 578.

Far from observing the rule laid down in these cases as to the form of hypothetical questions, counsel for plaintiff excluded from their questions facts which had been established in the case, and based their queries solely from a view of the circumstances which was not established or demonstrated by any of the facts before the court.

In short, Drs. Smythe and Webb were improperly admitted to testify as experts, because the questions upon which their testimony was given were not peculiarly within the scope of expert knowledge, and the jury were competent to pass upon the matter for themselves. Second, even were the subject one for expert opinion, Dr. Smythe's testimony was improperly allowed when he declared his opinion would be a matter of conjecture. Third, even were the testimony in the case admissible and solicited in the right form, the character of the questions propounded by the plaintiff would have made it objectionable. In a series of hypothetical questions facts are assumed which are not established by the evidence, and important matters which are so established are overlooked.

VIII.

The court erred in admitting, over the objection of the defendant, the following evidence contained in the testimony of Frank Sayers, on cross- examination, a witness for the defendant, to-wit:

"Q. Had this upright to which the pulleys are attached, and through which the chain passes, which connects with the water spout, been elevated?

"A. It had not been done at that time.

"Q. How did you know it hadn't?

"A. Because I noticed it after it was done.

"Q. When was it done?

"A. Eight or ten days after I made those measurements.

"Q. Did you see it done?"

Counsel for defendant here objected to any change being shown in the appliances connected with the spout after the accident occurred.

"Judge Hammond: What day of the month did you make this measurement to which you have testified?

"A. It was along about the 3d or 4th of September.

"Judge Hammond: This accident happened on the 18th of August?

"A. Yes, sir.

"Mr. Fitzhugh: Do you know the date when these changes were made?

"A. No, sir; I don't know the date, but, passing there the first time after it was made, I noticed the difference in the spout.

"Judge Hammond: Did you make your measurements before you noticed the change?

"A. Yes, sir."

Counsel for defendant then asked that the details in the change of the spout be excluded; that what the witness said about noticing changes made in the spout be also excluded. This motion was overruled by the court, and the defendant excepted.

Second—"Judge Hammond: At the time you made these measurements, did you notice any changes in this structure as you knew it before?

"A. If there were any changes they were so slight I could not detect it.

"Q. Was that the time, 8 or 9 days after you took the measurement, that you say you noticed the change?

"A. No, sir; I noticed it on the train in passing, but did not stop off.

"Q. When was that?

"A. I could not give it.

"Q. How many days after you took the measurements before you went back?

"A. It was probably two weeks, maybe more.

"Q. Were you not there 8 or 9 days after you took the measurements at Goodwin, Ark., after this change—after you took these measurements?

"A. I am not certain. It would be somewhat about that time."

Defendant again objected to this testimony, and upon the court overruling the objection, an exception was taken.

Continuing, the witness testified as follows, over this same objection of the defendant:

"Q. And you have not, about the times, the days or weeks, any recollection?

"A. I can say I am certain it was 12 or 14 days after I took the measurements that I noticed the change."

It is an established rule in nearly every jurisdiction in this country that subsequent improvements are not to be construed as an admission of prior negligence upon the part of the defendant. In Kansas and Pennsylvania alone has a different conclusion been reached by the courts, although Utah has, in an isolated case, given a partial allegiance to the rule. The United States Supreme Court has given the question careful consideration, and has decided that subsequent changes are not relevant to show antecedent conditions to have been negligent.

In the case of Columbia R. Company vs. Hawthorne, 144 U. S., 202, the earlier cases upon this subject were carefully reviewed and the conclusion reached that prior negligence could not be in any case inferred from subsequent changes or improvements.

Had the evidence of Mr. Sayers been introduced, therefore, to show directly that the railroad company had been negligent in the construction of its tank and appliances at Goodwin, Ark., there would have been no question as to the error of such admission. Counsel for plaintiff, however, claimed that the evidence was properly admissible because counsel for defendant had asked Mr. Sayers whether or not his measurements were made before any alterations in the tank at Goodwin. Mr. Sayers had, in effect, been asked such a question; but no details as to the character or nature of the change were sought to be introduced by the defendant, and this evidence could not, therefore, be considered as rebuttal of the evidence of the defendant.

In order to make Mr. Sayers a competent witness as to the conditions of the tank and to establish that the meas-

urements taken by him were the same as those existing at the time of the accident, it was necessary to establish the fact that no change had been made at the time Mr. Sayers' measurements were taken. The question asked by defendant's counsel was, therefore, not only relevant and proper, but was absolutely necessary. It is inadmissible to show the conditions after the accident, unless it is shown that no change has occurred in the meantime. This is an established rule and has been laid down in a number of recent cases, as well as in all of the older decisions.

See Green vs. Ashland W. Co., 77 N. W., 722; Crowley vs. Edwin, 87 Federal, 540.

See Greenleaf on Evidence (16th Ed.), Section 14—for collection of cases.

It was imperatively demanded for the defendant, therefore, to establish that there had been no change in the tank between the time that the accident occurred and Sayers' measurements were taken. Such evidence, however, could not be construed as an effort to ascertain the nature of the changes which had been made in the tank, and there was no merit in the contention of plaintiffs' counsel that specific reference to the nature of the changes was authorized by the questions of the defendant. Such specific references to the changes were repeatedly made in the course of the cross-examination. The actual date of the subsequent changes was minutely inquired into and the character of the changes sought to be ascertained. On cross-examination plaintiffs brought out the fact that the spout had been altered, and that the alterations consisted in the elevation of the spout some distance above its former position. Even if we grant that the fact of change was admissible, it would not be admissible to show the character of such change. The fact of the change, however, was inadmissible evidence, the only relevant question being whether or not the pipe had been changed at the time when the witness made his measurements. It being shown that the pipe was the same at the time his measurements were taken as it was on the day of McDade's injuries, further inquiry as to the changes was incompetent.

The scope of the rule excluding evidence of subsequent improvements, and the citation of cases upon the subject will be considered at length in the tenth assignment of error.

IX.

The court erred in excluding the following evidence of W. W. Sherwood, a witness for the defendant, which appears on his re-examination, as follows:

"Q. I will ask you this hypothetical question: Suppose Mr. McDade was sitting on the side of the car, and was sitting on the north side facing north, throwing his body in the position in which I am sitting, facing north, the car going west, and the tank spout being situated on the north, if he was struck by that spout, would you say from your familiarity with people being knocked off of trains and falling bodies of that character, and from the situation in which he was found, 675 feet west of the tank where the spout hit him, that he could have been knocked off by the spout?"

Counsel for plaintiff objected to this question and answer, and the objection was sustained by the court, to which defendant excepted.

The defendant then requested the court to allow him to repeat the question with the element in the hypothetical question that the train was going twenty-five miles an hour. This request was refused and defendant excepted.

Mr. Sherwood had qualified himself as an expert upon this subject, having testified that he was an expert trainman, and was familiar with accidents of the character and kind set forth in the testimony. Although the question did call for an opinion, which more or less embodied the issue to be decided by the jury, it was within the rule relating to hypothetical questions as clearly as those questions allowed to be propounded by the plaintiff. In the sixth and seventh assignments of error the hypothetical questions asked by the plaintiff have been set out, and it has been shown that such hypothetical questions were a violation of the established rules upon the subject as laid down in this and other courts. It is not contended here that the question asked Mr. Sherwood did not go a little further than the rule admitting expert evidence upon such subjects. If, however, the rule of the trial court in admitting the hypothetical questions of the plaintiff as set out in the sixth and seventh assignments of error was correct, the hypothetical question propounded to Mr. Sherwood was admissible. The facts assumed in this hypothetical question were those which the plaintiff had assumed to establish the theory of his case, and the question

was asked of a qualified expert upon the question. In fact, Mr. Sherwood was much more fit to deliver an opinion upon the subject of McDade's injury as regards the distance he could have traversed after the injury than were the physicians who testified as to the number and character of blows necessary to produce the wounds found upon the deceased.

X.

The court erred in admitting, over the objection of the defendant, the following evidence found in the cross-examination of G. P. Poole, a witness for the defendant:

First—"Q. Was the change made under your supervision?

"A. Yes, sir.

"Q. When was that change made?

"A. It was somewhere from the 5th to the 20th of September, probably a little later.

"Q. The 5th to the 20th of September, 1900?

"A. Yes, sir.

"Q. You can't get it nearer than that?

"A. I can't from memory. I can say, however, after the 5th, because the man who done the work did not commence until the 5th, and it was some days after he commenced that he made the change. I think it was probably five or six days after the 5th."

These questions were objected to, and, upon the said objection being overruled, the defendant excepted.

Second—"Q. Did you give any specific instructions as to the changes to be made on this spout and its appliances in September, 1900?

"A. I gave a letter; I wrote a letter to all the foremen.

"Judge Hammond: Did you give him any specifications to work by?

"A. Just a letter; nothing else, only what I have stated.

"Q. Do you know of your own personal knowledge that these changes, if any, were made?

"A. Just what the men reported to me.

"Q. Weren't you there last night?

"A. Yes, sir.

"Q. Do you know whether they were made or not?

"A. I know there is a mark there; it looks to me like it had been raised."

To this last answer the defendant objected.

The court then spoke as follows: "If this company has changed this structure in such a way that we cannot get at the measurements that existed on the 18th of August, except by comparison, I'll let that change go in. You may show the measurements that existed on the 18th of August."

The defendant objected to this line of inquiry. Upon the court's overruling the objection, defendant duly excepted.

The defendant also objected to the following questions and answers:

"Q. Didn't you get up and look and say a few moments ago that the bar had been elevated?

"A. Yes, sir; to the best of my judgment, three inches.

"Q. The cross-bar, that is the one upon which the pulleys hang and over which the chains run and connect with the pipe?

"A. Yes, sir.

"Q. To the best of your knowledge, that cross-bar has been elevated three inches, under the instructions given by you in September; it has been raised three inches?

"A. I judge so.

"Q. What effect would the raise of the cross-bar, lifting that three inches, have upon the chain and spout—how much, in other words, would that shorten the chains?

"A. Well, it would be guesswork.

"Q. Is it a fact that that would shorten the chains twice the amount of the elevation of the bar?

"A. Yes, it would seem so.

"Q. That it would carry the point of the spout, the nozzle, back about six or seven inches?

"A. Yes, sir; that is my idea.

"Q. Or make it much shorter, which?

"A. Carry it back; it would raise it, certainly."

The objection of the defendant was overruled as to these questions and the defendant excepted.

There was even less reason for allowing Mr. Poole to testify upon these matters than there was in permitting Mr. Sayers to bring out the fact of a change. Mr. Poole had testified that he measured the supply pipe of the tank, and that at the time he took such measurements no alterations or change had been made in the said supply pipe, and that no alterations had been made therein at the time of the trial. These facts being established, the admission of his measurements was proper, and his competency as a

witness to testify to the location of the supply pipe was established. This was the only point upon which his testimony had been sought by the defendant, and it was manifest error to permit opposing counsel to elicit, on cross-examination, the details of those changes which had been made in the sway spout between the time of the accident and the time of the measurements. The witness did not testify and had not sought to testify as to the character of the sway spout, but had confined his testimony to the location and position of the supply pipe. Opposing counsel was allowed to propound to him questions showing that the cross-bar through which the chains connected with the supply pipe passed had been elevated, and elicited the information that a slight elevation of this cross-bar would make a considerable alteration in the position of the sway spout.

Opposing counsel expressly disclaimed any intention of establishing the negligence of the company from the testimony of Mr. Poole to the effect that the supply pipe had been altered since the accident, but there was, however, no other real ground upon which such evidence could be admissible. It was contended that these measurements were allowable to establish the actual condition of the tank at the time of the accident, but for such purpose, the fact of the changed condition and the details thereof after the accident threw no light on this point, and, therefore, was clearly inadmissible.

The limitations placed upon the admission of evidence as to subsequent conditions for the purpose of showing conditions at the time of the accident have been given above, in the eighth assignment of error. It has been shown there that, in order to introduce the condition after an accident, it must be established that there has been no change since the accident. It was improper, therefore, to endeavor to secure data as to the condition of the tank at the time of the accident by introducing the subsequent repairs. In order to show the condition at the period of time when Mr. McDade was injured, it was incumbent upon the plaintiff in error to secure the evidence of parties who had made measurements at that time, or who had made them before the change.

An examination of the rule excluding subsequent repairs will show, however, that it is the wisdom of the law to exclude such testimony on whatever ground it is sought to be introduced.

About the earliest case upon this subject was decided in the Supreme Court of Vermont. Here it was held that the reason why the testimony was excluded was that there was no logical sequence which could justify an inference from subsequent repairs, of prior negligence. The conclusion here was based upon the ground of logical sequence, and the evidence was, therefore, held to be irrelevant. This was the ground which was taken in most of the earlier cases, and it was on account of this reason being given for the rule that so much confusion existed in the earlier reports upon the question of the admission or exclusion of this evidence.

The later consideration of the subject has led, however, to a change of view, and it has been held that the test of evidence in general is not, frequently, the mere possession or lack of a logical sequence or of probative value. There is a large amount of testimony which is excluded on the ground that its admission has a tendency to prejudice or inflame the minds of the jurors or confuse them as to the real issues involved in the trial.

In Greenleaf on Ev. (16th Ed.), Section 14—a., the rule is laid down that evidence which tends to produce confusion of issue or inflame the minds of the jury is on that account inadmissible, even if it does possess a certain amount of probative value.

In Abbott's Trial Practice, page 36, the following are said to be the reasons for the exclusion of evidence of subsequent repairs: "The evidence is incompetent because the taking of such precaution against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the issue and prejudice them against the defendant." The doctrine as laid down by these text writers has been followed in a number of well-decided cases.

In Corcoran vs. Village of Peekskill, 108 N. Y., 151, the court says, in speaking of the admissibility of subsequent repairs: "While such evidence has no legitimate bearing upon the defendant's negligence or knowledge, its natural tendency is undoubtedly to prejudice and influence the minds of the jury."

In Payne vs. Railroad, 9 Hunter, 526, Learned, C. J., says: "The only way in which such subsequent acts (repairs) could bear upon the question would be as an ad-

mission that the company had been negligent, *so a jury would be likely to understand such proof.*"

In Barber Asphalt Paving Co. vs. Odasz, 8 C. C. A., 473, the court refused to allow the evidence of subsequent repairs to be introduced, and in speaking of such evidence, says: "We think that the answers having been objected to, should not have been permitted to go before the jury, for with the tendency of juries in actions for injuries to the person to find the fact of negligence upon insufficient grounds, this class of acts of the employer is received by them as an admission of prior negligence. Although the judge did not intend to allow the testimony upon the theory that it tended to prove negligence, *we think that its admission had an injurious effect, and that a new trial should be had.*"

This, therefore, seems to be the attitude of the courts at present upon the admission of testimony showing repairs after accident. Such evidence is not allowable because it is apt to be taken in an improper manner by the jury, and is likely to be construed by them into an admission of negligence on the part of the defendant.

The experience of the courts in general coincides with that of the learned judge of the Circuit Court of Appeals in the case quoted above. The jury are apt to consider slight circumstances as bearing upon the subject of negligence; and, on that account, such testimony as to subsequent repairs will influence their judgment and prejudice their minds against the defendant.

If such is the tendency of this character of evidence, a sense of fairness toward the defendants in certain cases demands the exclusion of all mention of subsequent repairs for what purpose so ever it may be introduced.

The records of the courts contain numerous cases in which this evidence of subsequent repairs has been sought to be introduced upon one theory or another. Such attempted introduction has been considered in more than one case as a pretext to get before the jury the fact of repairs in the hope that the natural tendency of juries to infer negligence would lead them to consider such changes as an implied admission on the part of the defendant that he had been guilty of negligence at and before the time of the accident.

In Clapper vs. Town of Waterford, 131 N. Y., 382, the court says: "Upon whatever pretext such evidence is put into the case, it is generally used to mislead the jury. It

is sometimes accepted by them as an admission of negligence, and its natural tendency is undoubtedly to influence them in that direction."

In this case the suit was for an injury occurring on a city sidewalk. It was claimed that the evidence of subsequent repairs was merely to show that the commissioner did have funds in his hands sufficient to allow him to make repairs as he was in duty bound to do. To same effect, see 81 Hun., 132.

In Anson vs. Evans, 19 Colo., 274, plaintiff sued on account of the breaking of a rope which had caused his fall. The court held that the evidence, to the effect that a new rope had been introduced since the accident, was not permissible. In this case it was claimed by plaintiff's counsel that the object of introducing the evidence was to impeach a witness of the defendant. The court, however, ruled the evidence out of the case.

In Fulton Works vs. Kimball, 52 Mich., 146, the plaintiff testified as to the condition of a bridge after the accident. It was held in this case that a question as to the purpose of certain changes used in the construction of the bridge was not allowable, it being sought thereby to show incidentally that the bridge had been improved and made stronger since the accident.

Lombar vs. East Towas, 86 Mich., 17 and 18. Counsel for plaintiff attempted to introduce evidence to show that repairs had been made in a sidewalk after the accident had occurred there. He disclaimed expressly any intention to use the testimony for the purpose of showing negligence prior to the accident, and claimed that the object of such testimony was to identify a board which was produced in court as the one through which the plaintiff's foot had slipped. The court held that the evidence was incompetent for any purpose, although on account of numerous other witnesses in the case, testifying to an identification of the board, they would not reverse upon this ground alone. The declaration as to the incompetency of the evidence for the purpose, however, is strong and unequivocal.

In Alcorn vs. Railroad, 108 Mo., 91, suit was brought because a switch of the railroad was improperly blocked. Plaintiff sought to introduce evidence to the effect that the switch had been properly blocked since the accident. Here also any intent to use such evidence as the basis of the inference showing negligence was disclaimed, but the court held the evidence inadmissible. The ground on

which it was sought to be introduced was to show the protective character of proper blocking, and that such blocking could be done. The syllabus is:

"Third—Other testimony could readily have been introduced to show the necessity of a proper block, and *the evident and only object of the controverted testimony was to convict the defendant company of a confession of negligence because of making repairs.*

"Fourth—The testimony for these reasons being wholly inadmissible as well as misleading, a general objection was sufficient."

In Fordyce vs. Chancy (Tex.) 21 S. W., 182, evidence was offered as to repairs made in a track, after the accident occurred. The court says of such evidence: "It cannot be held to serve any legitimate purpose in establishing the condition of the road at the time of the accident; for, after the witness had stated all facts properly admissible for that purpose, *they were allowed to go further and state in detail what had been done toward improving the track.*"

The case is directly in line with the contention made by plaintiffs in the question before the court.

In Hammarger vs. City of St. Paul, 67 Minn., 6, evidence was introduced as to subsequent repairs in a sidewalk. The contention of the plaintiff was that such testimony was admissible to show the location and the identity of the hole in the walk. The evidence was, nevertheless, held incompetent. The court says that inasmuch as no effort was made to limit the evidence to the points contended for by the plaintiff, it would be excluded for all purposes; but they say expressly that even had an effort been made to limit its scope they would not say it would then be competent.

In Bell vs. Shingle Co., 8 Wash., 27, the fact of repairs was sought to be brought out on the cross-examination of the defendant's witness with the alleged purpose of discrediting him. The court held that the evidence was irrelevant and inadmissible for this purpose.

In Dillon vs. Raleigh, 32 S. E. (N. C.), it was sought to show by evidence of the removal of certain benches what the nature of the construction was at the time of the accident. The court held that the evidence was inadmissible for this purpose. This case is also directly in line with the contention made by the plaintiff that this evidence was admissible to show the condition of the tank at the time of the accident.

In Shinners vs. Prop. Locks, 12 L. R. A. (Mass.), 554, the following question was asked: "What, if anything, was done by the defendants to the bank after the accident?" The Supreme Court sustained the lower court in its ruling excluding this question from the evidence. This case is a peculiarly strong one. Counsel for defendant had introduced testimony to show the manner in which a bank of earth was shored up before the accident. These witnesses testified that no other circumstances of weakness than those guarded against had been seen. It was then that the plaintiff sought to show the changes after the accident. In commenting upon the ruling as to this evidence, the court says: "As we are of opinion that, in any aspect of the case, the questions put to the plaintiff's witnesses were properly excluded, the order must be, exceptions overruled."

The plaintiffs had claimed that the question which they asked with regard to the precautions after the accident would tend to discredit the testimony of the witnesses for the defendant and to the effect that no other circumstances of weakness than those guarded against were observable in the bank of earth.

In Barber Asphalt Paving Co. vs. Odasz, supra, the plaintiff sought to introduce evidence to show that the track on which the sand car of the defendant ran was capable of a construction which would prevent accidents. The court says: "The testimony was wanted by plaintiff's counsel for the purpose of proving negligence. The answer showed the jury that changes had been made after the accident for the purpose of preventing similar calamities in the future. A plausible but untrue inference from this class of testimony is apt to be that the subsequent act, for the purpose of securing perfect safety in the light of past experience, is an admission of a previous omission to take proper precautions, and has the effect to call the minds of the jury away from the real issue, which is that of reasonable but not extraordinary care at the time of the accident, in view, among other considerations, of previous experience.

In Hodges vs. Percival, 132 Ill., 53, the line is sharply drawn and the court held that evidence could be introduced to show that there were valuable appliances known to the defendant, which he did not employ at the time of the accident, but that such ground would not justify the

introduction of testimony to the effect that the plaintiff had adopted such appliances after the accident.

In the leading case of Nolley vs. Hartford Carpet Co., 51 Conn., 526, where the rule against the introduction of subsequent repairs was laid down after the consideration of all the earlier cases, the court said: "The only possible bearing which the evidence in question could have would be as an admission that the previous precautions were insufficient and negligent." In this case the evidence was not sought to be introduced purely to show prior negligence, but was sought to be brought into the case in rebuttal of the testimony of the defendants that a certain door could not have been broken open without violence.

It will be seen, therefore, that in numerous cases, where various reasons have been invoked to justify the introduction of evidence of repairs, the courts have decided that the only real purpose such evidence could serve in such cases would be to show the prior negligence of the defendant. The real reason for the exclusion of the evidence is not alone, therefore, its lack of probative value, but also the liability of such evidence to cause confusion of issue and unfair prejudice in the minds of the jury. We have seen above in the cases cited that even where the evidence was sought for the express purpose of showing the condition of a place prior to and at the time of the accident, testimony of repairs was not allowed.

It is on this ground that the trial court allowed evidence of the changes in the tank at Goodwin to go before the jury.

The cases above cited show that, even upon this apparently legal pretext, the evidence was not admissible. The reason of this rule is emphatically against the allowing of such testimony for any purpose. That it does, and must, have its effect upon the jury in establishing negligence is open and obvious from the precautions which have been taken to prevent them from considering it under any circumstances.

"Where incompetent evidence has been introduced, and it cannot be told how much it prejudices the defendants, the judgment should be reversed." Railroad Co. vs. Hawthorne, 104 U. S., 202.

There are certain cases in which evidence of subsequent repairs has been admitted for a limited purpose; but in these the court has always observed a strict adherence to the rule that the defendant must not be prejudiced by such

admission in any manner. For example, these admissions have been allowed in Massachusetts, to show that the party repairing exercises dominion of the *locus in quo*. The tendency of the courts to allow such evidence, even for this limited purpose, however, is on the wane, and such evidence is not allowable where the fact can be otherwise established.

To summarize: The holdings of the courts upon the subject of the admissibility or exclusion of evidence of repairs after the accident, the following rules may be laid down:

First—Such evidence is not admissible to show negligence of the defendant, because it has no probative value.

Second—Such evidence is not to be admitted, because it tends to prejudice the minds of the jury, and to produce confusion of issue.

Third—The concurrence of these two reasons prevent such evidence from being introduced upon any pretext, even where it is claimed that the purpose of such evidence is not to show negligence upon the part of the defendant.

These rules being established, it was manifest and reversible error to allow the questions propounded by the plaintiff to Messrs. Poole and Sayers to go before the jury.

ASSIGNMENTS XI., XII., XIII., XIV., XV., XVI. AND XVII.

All of the above assignments may be discussed together, since they all depend upon the same principles of law, and, necessarily, in the discussion of the validity of one all of them are embraced. They are as follows:

XI.

The court erred in charging the jury as follows: "But if you find, from the evidence, that his death was caused by a collision with the overhanging waterspout, either by a blow sufficient of itself to kill him, or by being so dazed and disconcerted by a blow from the spout or the down-hanging chain, that he was either precipitated from or fell from the cars with sufficient force to kill him, the company would then be liable to his widow and their children in such damages as are given by the statute of Arkansas, which has been read in your hearing."

To this portion of His Honor's charge exception was duly taken by the defendant. (Record, p. 184.)

XII.

The court erred in charging the jury as follows: "I will not delay your consideration of this case by reviewing any argument of fact or law involved in it, since that has been so well done by counsel on either side, and since, moreover, interesting as it is, the case presents no serious application of either fact or law requiring the court's attention. As you have observed, there is much conflict of judicial opinion in deciding the cases analogous to this in fact and law, but the court here takes the responsibility, as once before in another case, to decide that it is negligence in itself for a railroad to so construct such appliances as that which we have before us, that they will injure the brakemen upon its trains. It is so simple a task, one so devoid of exigencies of expense, necessity or convenience, so free from any consideration except that of the foot rule, and so entirely destitute of any element of choice or selection that not to make such a construction safe for the brakemen on the train is a conviction of negligence. Therefore, I submit the case to you upon the plain propositions above mentioned. I repeat—

"First—Was McDade killed by a collision with the spout or its chain, either directly or by a fall in consequence of a collision with either of them?

"Second—Did he know of the danger at the time, or might he have known it if he had been using ordinary care to inform himself of that danger, either before or at the time of the accident?

"If you find both of these propositions in favor of the plaintiffs they should recover."

To which exception was taken at the time by the defendant. (Record, p. 185.)

XIII.

The court erred in refusing the following special instruction, to-wit: "I. B.—The court charges you that the defendant railroad company was obliged to use ordinary care in the selection and construction of the water tank and its appliances at Goodwin Station; that is, to so construct it that it would not necessarily endanger its employes, whose duties required them to pass by it; but, as between the defendant and the deceased, the defendant was not bound to construct and use such appliances as were of the best or most improved pattern, if these appliances were such at the time of the death of McDade as were in general

use; in order that the plaintiff may recover in this case it is necessary for the plaintiff to convince you, by the preponderance of evidence, that the construction and location of the water tank, or its appliances, were not in general use throughout the country. So, if you believe, from the evidence, that the defendant did use ordinary care and prudence in the selection and arrangement and care of the water tank at Goodwin Station, and that such a tank was one which, in the experience of the railroad business was reasonably safe, then there can be no recovery in this case. Ordinary care is that degree of care which an ordinarily prudent man engaged in a like business would use under the circumstances of the case, and the test of what is ordinary care is this: Whatever is according to the general, usual and ordinary course adopted by those in the same business is reasonably safe, within the meaning of the law, and, hence, is the test of what is ordinary care." (Record, p. 190.)

XIV.

The court erred in refusing the special instruction No. 2, requested by the defendant, which is as follows: "Where there are several methods in general use, it being a matter of judgment, depending upon surrounding conditions, the defendant has an absolute discretion to select according to his own judgment. The test of liability is not danger, but negligence, and negligence can never be imputed from the employment of methods, appliances and machinery which are in general use in the business; so, if you believe, from the evidence, that on some railroads the sway spouts of tanks were hung in a vertical position, and upon other well regulated railroads the sway spouts upon water tanks were hung at an angle similar to the angle at which the sway spout upon the Goodwin tank was hung, then the defendant has fulfilled the requirement of the law, and no matter whether the deceased was killed by coming in contact with the spout or not, there can be no recovery in this case." (Record, p. 191.)

XV.

The court erred in refusing the third special instruction requested by the defendant, which is as follows:

"The defendant did not undertake with McDade that it would use the very water tank and appliances, nor was the defendant called upon to discard the same, if it was reasonably suited for his business, though there were other water

tanks that were safer; if you believe from the evidence that this tank and its appliances were reasonably suitable for the business and reasonably safe, you should find for the defendant." (Record, p. 191.)

XVI.

The court erred in refusing to give in charge defendant's special instruction No. 4, which is as follows:

"If you believe, from the evidence, that the sway spouts upon the various well regulated railroads of this country were hung at different angles, and projected toward the track at different distances; and you likewise believe, from the evidence, that the method of hanging the sway spout at Goodwin was in common use by many of the well regulated railroads of this country, then you should find for the defendant, even though you believe that the defendant made an error of judgment in selecting one method of hanging sway spouts instead of selecting another method of hanging this appliance, if you believe that both methods are in common use." (Record, p. 225.)

XVII.

The court erred in refusing to give in charge the defendant's special instruction No. 5, which is as follows:

"It is the duty of the master to use ordinary care to furnish machinery and appliances reasonably safe and suitable for the use of the servant; that is, such as with reasonable care on the part of the servant can be used without danger to him, except such danger as is incident to the business in which such instrumentalities are employed; so, also, it is the duty of the master to provide a reasonably safe place in which the servant can do his work, and to keep it in such suitable condition. This duty is not absolute, but relative. It is measured by the nature and character of the employment, the location of the premises and their surroundings. There are employments that are of themselves dangerous, in connection with which no position can be made secure. In such cases the law only requires of the master that he use ordinary care that the dangers of the employment are not unnecessarily enlarged; that he shall take proper care to furnish such safeguards as are customarily employed in the performance of like hazardous service, so that the servant, exercising proper care, may render his services without exposure to dangers

that are not within the obvious scope of his employment as usually carried on. The master may, however, conduct his business in the way that seems to him best, although other ways may be less hazardous, and still not be liable in damages. In such a case, if the servant knows the danger attendant upon such manner of prosecuting the work, he assumes the risk of the more hazardous method. Therefore, the servant, upon his part, assumes the natural and ordinary risks attendant upon his employment. He does not, however, assume the unusual and extraordinary risks which the master knew or should have known or foreseen, unless such risks are obvious, or the servant has actual knowledge or presumed knowledge of the danger. It is likewise the duty of the servant to use ordinary care to ascertain what the dangers are attendant upon the service in which he engages; and it is likewise his duty to protect himself against known dangers and such dangers as he can by the use of ordinary care ascertain; and this duty is just as imperative upon him as that laid upon the master." (Record, p. 192.)

ARGUMENT.

The court erred in charging, as set forth in assignments XI. and XII., that if the bare fact that McDade was struck by the sway spout was proven, that then this was negligence, *per se*, and the plaintiffs were entitled to recover unless the defendant proved, by the preponderance of the evidence, that the deceased was guilty of contributory negligence. We have in assignment No. I fully discussed this question and there contended that upon principle and authority there was no negligence upon the part of the defendant in so constructing its water tank and sway spout at Goodwin Station, and we there cited the great weight of authority, which supports our contention.

There are few, if any, of the cases that go to the length of holding that merely the construction of a projecting structure in such a manner that it may possibly knock a brakeman from a train, is negligence, *per se*, irrespective of the facts and circumstances of the particular case. It will be noticed in the case at bar the court broadly charges that all that the plaintiffs need prove in order to convict the defendant of negligence is merely the fact that McDade was knocked from the car by the sway spout. We admit that there are cases which hold that under particular cir-

cumstances it is negligent for a railroad company to so construct its structures as to endanger the lives of its employes, but we know of no case that holds this, irrespective of the facts, and the examination of the cases will bear us out in this contention; thus in the following cases it was held to be a question for the jury: Gates vs. Railroad, 4 S. D., 433; Railroad vs. Markey, Tex., 19 S. W., 392; Kelleher vs. Railway, 80 Wis., 584; Piddock vs. Railway, 5 Utah, 612; Allen vs. Railway, 57 Iowa, 623; Railway vs. Burton, 97 Ala., 240.

The most that can be made out of the case, Railroad vs. Mortenson, 11 C. C. A., 335, by the plaintiff is that it is for the jury to say whether or not the maintenance of such structures is negligence upon the part of the defendant according to the circumstances of the particular case, and hence, if this honorable court does not adopt our view that it is not negligence upon the part of the defendant to maintain such a structure, we contend that it will hold that it was not negligence, *per se*, and that the lower court erred in so charging. The Mortenson case uses this language: "The principal questions discussed by counsel are: (1) Was it negligence for the company to maintain a bridge having overhead tie-beams too low to admit of the safe passage of a brakeman standing on the running board of a furniture car in the discharge of his duties when no warning of the dangerous character of the bridge was given by telltales or otherwise? (2) Was the brakeman guilty of contributory negligence in not ascertaining by measurements or observations, that he could not pass safely while standing on the running boards of a furniture car. Under the evidence in this case these were not questions of law, but questions of facts for the jury.

The court erred in refusing the special instructions set forth in assignments XIII., XIV., XV., XVI. and XVII.

Special instruction No. 1b, set forth in assignment XIII., was taken almost literally from the cases of Reid vs. Stockmyer, and Logging Co. vs. Snyder.

Special instruction number eleven, set forth in assignment XIV., was taken almost literally from Seeley vs. Railroad, 152 U. S., and Bailey on Master and Servant, Section 114, where this language is used: "Where several appliances are in use each of which is regarded by men of skill and experience as safe and proper, the master may not be made liable where in selecting the appliances which

cause the injury to his servant, he took the one which, according to his judgment, and that of skilled men in his employ, was the best. It is culpable negligence, not an error of judgment, which imposes liability." See, also, Bailey, Vol. 1, Sec. 222; also Sec. 227; to the same effect see Holley vs. the Railroad, 142 N. Y., p. 31; Seffinfield Street Railway Co., 91 Cal., 48; Kehler vs. Schwenk, 144 Pa. State, 348.

This special instruction is likewise supported by Reid vs. Stockmyer, supra; for therein it is stated that the master may, however, conduct his business in the way that seems to him best, although the other ways may be less hazardous.

The court erred in refusing the third special instruction requested by the defendant, which is set forth in assignment XV., for the reason that this special instruction sets forth the well settled rule of law that only reasonable care is required of the master. This instruction was taken literally from Bailey, Vol I., Section 75.

The court erred in refusing to give special instruction number four, which is made the subject of assignment No. XVI. This is taken literally from Section 75, Bailey on Master and Servant.

The court erred also in declining special instruction number five, set forth in assignment XVI. This instruction was taken from Reid vs. Stockmyer, supra.

XVIII.

The court erred in refusing to give the defendant's special instruction number six, in its original form, and likewise erred in modifying it. Said special instruction number six, in its original form, was as follows:

"If you believe, from the evidence, that the sway spout was hung at an improper angle, and too near the track, and you likewise believe from the law, as above given you, that the defendant was guilty of negligence in so hanging such spout, but you likewise believe that McDade was an experienced brakeman, and that he knew, or by the exercise of ordinary care should have known, of the danger incident to the construction and location of the sway spout, and that after he knew, or by the exercise of ordinary care should have known such fact, he voluntarily continued in the employment of the defendant railroad company, then the court charges you that he assumed the risk

of whatever defects there were in the construction and location of the tank and its appliances, and there can be no recovery in the case."

The court gave this instruction to the jury, with this addition and modification immediately following its conclusion, to-wit: "But the given danger must have been one open to ordinary observation, and not one lurking or hidden from the view."

The court erred in modifying this instruction as set forth above, for the court thereby left it to the jury to say, in the first place, whether or not the danger from the tank was obvious, while, as discussed above, we contend that reasonable men should not have differed upon that proposition, but that it was manifestly so.

Again, in the special instruction, as set forth in its original form, the jury are instructed to find for the defendant if they believe that McDade was an experienced brakeman, and that he knew, or by the exercise of ordinary care should have known, of the danger incident to the construction and location of the sway spout, etc., while the court, by interpolation of the above modification negatives this idea by stating that the danger must be one open to ordinary observation. Now, the danger may frequently be open to the observation of an experienced railroad man, and yet not open to ordinary observation in the sense of being plain to the casual observer.

Again, as set forth in Reid vs. Stockmyer, the servant on his part assumes the natural and ordinary risks attendant upon his employment, and assumes also all unusual and extraordinary risks if they are obvious, or the servant has actual or presumed knowledge of the danger. Here, we submit, this was a risk manifestly incident to the employment of McDade, since he was obliged to come in contact with this machinery every day in passing and repassing Goodwin Station. Consequently, as set forth in Reid vs. Stockmyer, it was the duty of the servant to use ordinary care to ascertain the dangers attendant upon the service in which he was engaged, but by the modification above set forth, the court, by implication, charges the jury that the servant need not use ordinary care to ascertain such dangers when such danger is lurking or hidden from view.

XIX.

The court erred in refusing to give in charge the eighth special instruction requested by the defendant, which is as follows:

"If you believe, from the evidence, that both the defendant company and McDade were equally competent to judge of the risks and hazards incident to the passing of cars, the sway spout at Goodwin Station, hung as it was hung prior to the death of McDade; and if you likewise believe, from the evidence, that both of them had equal knowledge of the surroundings, the defendant cannot be held liable in damages, although the sway spout was dangerous, and although it might have been made safer by the defendant if it chose to do so."

XX.

The court erred in refusing to give the ninth special instruction requested by the defendant, which is as follows:

"If you believe, from the evidence, that the deceased, McDade, had an equal opportunity with the defendant for observing the sway spout and the manner in which it was hung at Goodwin Station prior to his death, and that McDade had likewise an equal opportunity of apprehending the dangers incident to passing underneath the sway spout upon freight cars, and with this knowledge continued in the service of the defendant company, then there can be no recovery, although you believe that the defendant was negligent in the way in which it constructed and hung the sway spout. In this connection, the court charges you that knowledge is either actual or presumed, that is, in the law McDade is presumed to have had knowledge of those facts which he should have known by the exercise of ordinary care."

These assignments specifically set forth the rule of equal knowledge, and were taken almost literally from Bailey's Personal Injuries Relating to Master and Servant, Secs. 775 and 777. Nowhere in the court's charge is this phase of the case discussed, yet we submit that these instructions embody a correct exposition of the law, and the rule of law that was truly applicable to the case at bar. We likewise contend that upon the admitted evidence in this case, if these instructions had been given, the jury would have been forced to have found in favor of the defendant.

XXI.

The court erred in refusing to give the tenth special instruction requested by the defendant in its original form, and in giving it as modified. The tenth special instruction was as follows:

"If you believe, from the evidence, that McDade was an experienced brakeman before he entered into the service of the Choctaw, Oklahoma & Gulf Railroad Company, and that prior to his death he had been in the employment of this railroad company for several months, a portion of which time he ran over what is known as the western division of the road, and a portion of which time he ran over what is known as the eastern division of the road, and if you likewise find, from the evidence, that the tanks on the western division of the road as well as the tanks on the eastern division of the road were constructed similar to the construction of the Goodwin tank; and that the sway spouts upon all of these tanks were hung, when in proper position, at the same angle, then you are to say whether or not an experienced brakeman, having opportunities that McDade did have, and passing these tanks as McDade did pass them, should, by the exercise of ordinary care, have been able to determine the dangers incident to passing underneath them upon freight cars. If you believe, from the evidence, that he should have had this knowledge, and with this knowledge continued in the service of the defendant company, then he is presumed to have assumed the risks, and there can be no recovery in this case. In this connection, the court likewise charges you that you may take into consideration the frequency or the infrequency in which furniture cars of a like height and width as the car upon which McDade was riding when killed were used over the defendant road."

The court modified this instruction by striking out the words "similar to" and adding thereto the words, "precisely as found in." The court likewise interpolated after the words "determine" the following phrase, "from his observation or experience while engaged in the business of the company." So, then, the entire sentence, as modified, and of which complaint is made, read, as changed by the court, as follows: "A portion of which time he ran over what is known as the western division of the road, and a portion of which time he ran over what is known as the eastern division of the road, and if you likewise find, from the evidence, that the tanks on the western division of

the road, as well as the tanks on the eastern division of the road, were constructed precisely as found in the construction of the Goodwin tank, and that the sway spouts from all of these tanks were, when in proper position, at the same angle, then you are to say whether or not an experienced brakeman, having the opportunities that McDade did have, and passing these tanks as McDade did pass them, should, by the exercise of ordinary care, have been able to determine from his observation or experience while engaged in the business of the company the dangers incident to passing underneath them upon freight cars."

By the modification as above set forth, on the tenth special instruction, the court committed error, for it charged the jury in effect that they could only consider the fact that McDade frequently passed other tanks on the C., O. & G. R. R., and daily came in contact with them as bearing upon the question of his presumed knowledge of the dangers incident to the sway spout at Goodwin, if the jury believed that the angles at which other sway spouts were hung *were precisely* the same as the angle, that at least it was a question for the jury to say whether or not knowledge should have been presumed upon the part of McDade, even if the angles at which the sway spouts hung were not identical, but similar. Of course, it is very improbable that the sway spouts upon all of these tanks were hung to the fraction of an inch identical, but yet, if they were hung at very similar angles, certainly the person passing and repassing them, and riding under them upon the tops of freight cars should have gained some idea from them by which to determine whether or not the sway spout at the Goodwin tank would endanger him.

XXII. AND XXIII.

The court erred in refusing to give the twelfth special instruction requested by the defendant, and which is as follows:

"If you believe, from the evidence, that the sway spout at Goodwin Station was not such a sway spout as was in common use, and that the defendant was negligent in the manner in which it constructed this spout, but you likewise believe, from the evidence, that neither the defendant nor the deceased should have, by the exercise of ordinary care, known of the danger incident to the construction and location of the spout, then there can be no recovery."

XXIII.

The court erred in refusing to give defendant's thirteenth special request, which is as follows:

"The defendant is not liable for an injury sustained by its servants in the course of his employment when the danger is of such a character that it must be just as open, obvious and apparent to the servant as to the master, or when it is such that it cannot be ascertained by either in the exercise of reasonable care and prudence."

Assignment 22 embodies the twelfth special instruction, which calls for the application of the rule that where neither the defendant nor the deceased should have, by the exercise of ordinary care, known of the danger incident to the construction and location of the spout, that then there can be no recovery. This instruction was taken literally from Bailey on Master and Servant, Vol. I., Sec. 785, and, as above discussed, was peculiarly applicable to this case, if the theory of the plaintiff was adopted by the jury; for certainly if McDade could not have, by the exercise of ordinary care, become aware of the dangers incident to the construction and location of the tank, although he passed there daily, then manifestly the defendant below could not have discovered it by the use of ordinary care.

The defendant's thirteenth special instruction has already been discussed under assignments 19 and 20.

XXIV., XXV., XXVI. and XXVII.

The court erred in refusing to give the sixteenth special instruction requested by the defendant, which is as follows: "The defendant, in the erection, construction and location of the Goodwin tank, was only required to use reasonable care to furnish a safe tank that would be safe under all circumstances, but was only required to use reasonable care to make the tank safe for those of its servants who, as they passed the tank, were in the exercise of ordinary care upon their parts; so, if you believe, from the evidence, that the deceased was struck by the tank, but that he did not use ordinary care in the position in which he was sitting, or standing on the car, then you should find for the defendant."

XXV.

The court erred in refusing to give in charge the seventeenth special instruction requested by the defendant, which is as follows:

"If you believe, from the evidence, that McDade knowingly selected a dangerous place as he passed under the Goodwin tank, when a safer place was apparent to him and he was thereby injured, then he is guilty of contributory negligence and cannot recover, even though you believe that the defendant was likewise negligent."

XXVI.

The court erred in refusing to give in charge the eighteenth special instruction requested by the defendant, which is as follows:

"If you believe, from the evidence, that McDade, as he passed the Goodwin tank, had a choice of several ways in which to stand or sit upon the car, one or more of which were perfectly safe and one of which was subject to danger or risk, he voluntarily chose the latter and was injured, he was guilty of contributory negligence and cannot recover."

XXVII.

The court erred in refusing the nineteenth special instruction requested by the defendant, which is as follows: "While the evidence shows that on ordinary occasions it is customary for brakemen to sit upon the side of the car, you are to say, from the evidence, whether or not McDade was guilty of negligence in sitting upon the side of the car as it passed the Goodwin tank; and, in order to determine this question, you should take into consideration all the facts in the case. If you believe, from the evidence, that the engine whistled for Goodwin tank; that McDade had been over the road many times before, and had passed Goodwin tank; that he had an opportunity to observe the dangers and risks incident to the way in which the spout was hanging, and, if you likewise believe that an ordinarily prudent man situated as McDade was situated would have observed such risks and dangers, and you likewise believe that an ordinarily prudent man from his familiarity with the road and the signals given should have known and recollected that he was passing the Goodwin tank, and you likewise believe that McDade could have passed the Goodwin tank by occupying a different position

with perfect safety, and, in fact, from all the facts and circumstances in this case, if you believe that an ordinarily prudent man would not have acted as McDade did act, and that this was one of the producing causes of the injury, then there can be no recovery, although you believe that the defendant company was guilty of negligence."

These assignments embody special instructions 16, 17, 18 and 19, which were refused by the court, and are based upon that phase of the case relative to the contributory negligence of the deceased. It is true that in the general charge the court did charge the jury, on page 218 of the Record, that if McDade either knew of the danger by the illumination of the headlight or by his previous knowledge of the condition of the road in respect to this water tank, and its overhanging spout, or if he might have known it by the exercise of that due care which an ordinarily prudent brakeman should use to inform himself of the obvious dangers of his particular employment on that road, then the plaintiff cannot recover.

But we submit that in this instruction to the jury the court limited the contributory negligence of McDade to the question of his knowledge of the danger, and upon that branch of the case we contend that the court nowhere instructed the jury with regard to the particular position that McDade assumed in passing the water spout, which was a direct issue in the case.

Again, the court failed to charge the well-settled rule as set forth in assignment 25, to the effect, that where the servant knowingly selected a dangerous place when a safer place was apparent to him, that this charges him with contributory negligence, and assignment 26 is practically to the same effect.

Assignment 27 embodies the evidence as shown by the undisputed facts in the case in an assumed case, and then instructs the jury that they are to say, from this evidence, whether or not McDade was guilty of contributory negligence. We submit that the very function of the special instruction is to call the jury's attention to the particular facts of the case, and then give them the rules of law applicable thereto, and likewise contend that it is error for a trial judge to refuse the embodiment of a correct rule of law based upon the facts proven in the case, and set forth in a special instruction, although the court may have properly charged the general rule of law; for juries are not learned in the law, and while laymen of in-

telligence are able to understand a special instruction which charges the result of a certain state of facts if proven, yet when the court merely gives general principles, they frequently are unable to apply them.

In conclusion, we submit that an affirmance of this case would violate not only a number of well-settled rules of law, but would likewise leave the determination of the adoption of methods of business, not to the judgment of men of ordinary prudence in the railroad business, but to the hypercriticism of so-called "experts."

In brief, this is a case where the deceased assumed all of the risks incident to the business as carried on by the defendant company, and cannot complain, even if that method of business was less safe than others that might be adopted.

J. W. McLOUD,
GEO. B. PETERS,
E. E. WRIGHT,
C. M. BRYAN.